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General

CIVIL JUSTICE REVIEW

Supplemental and Final Report

November 1996

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Published by the

Ontario Civil Justice Review
November 1996

Copies are available in person from:

Ontario Civil Justice Review
180 Dundas Street West, Suite 2005
Toronto, Ontario
M5G 1Z8

Ontario Government Bookstore
880 Bay Street, Main Floor
Toronto, Ontario
M7A 1N8

or by mail through

Ontario Civil Justice Review
180 Dundas Street West, Suite 2005
Toronto, Ontario
M5G 1Z8

or

Publications Ontario
50 Grosvenor Street, Main Floor
Toronto, Ontario
M7A 1N8

For more information call: (416) 325-8564

ISBN 0-7778-5577-1

CIVIL JUSTICE REVIEW

SUPPLEMENTAL AND FINAL REPORT

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November, 1996

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Dear Chief Justice and Attorney General:

We are pleased to submit for your consideration the *Supplemental and Final Report* of the Civil Justice Review team.

In our *First Report*, submitted in March 1995, we set out what we believe to be the blueprint for a civil justice system which meets the benchmark criteria established at the outset of our earlier deliberations, namely those of:

- fairness
- affordability
- accessibility
- timeliness
- accountability
- efficiency and cost-effectiveness
- a streamlined process and administration

This completes the broad review of the civil justice system which your predecessors in office requested us to undertake. The blueprint drafted in our *First Report* forms the foundation and basis for the further recommendations contained in this *Supplemental and Final Report*, which are intended to supplement, not supplant, the proposals of the *First Report*. The two must be read together.

Much of a constructive nature has been accomplished towards implementation of the *First Report's* recommendations. We have summarized those efforts here. At the heart of the *Supplemental and Final Report*, however, is a more comprehensive examination of the case management system and supporting rules which we propose be introduced on a province-wide

basis and of the manner in which ADR techniques should be integrated into that system. In addition, we make further recommendations in the areas of family law, landlord and tenant, small claims, construction liens, enforcement and venue.

While in some of these latter subjects we have not been able to offer "final" recommendations because it became apparent to us that to do so would take us beyond our mandate to propose "specific and implementable solutions" -- we have made what we believe to be important recommendations with respect to each of them, and we have put forward suggestions as to how they might be further pursued. For instance, we have recommended strongly that a separate Family Justice Review be created to carry out in the family law area the same sort of "congealing" exercise for which the Civil Justice Review has been a catalyst in the civil justice system generally, and we have proposed reforms for further consideration in the areas of small claims and enforcement.

None of this could have been accomplished without the dedicated efforts of the Civil Justice Review staff and without similar contributions from our advisory participants and others who generously offered the benefit of their wisdom and experience.

Nor, of course, could any of this have been accomplished or any of our previous recommendations implemented without the acceptance and support of you. We are grateful for that, and for your trust and support throughout our endeavours.

We look forward to your considered response to the recommendations in this report.

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EXECUTIVE SUMMARY

PART I BACKGROUND AND VISION

The Civil Justice Review was established in 1994 at the joint initiative of the former Chief Justice of the Ontario Court of Justice and the former Attorney General for Ontario. The Review's mandate is "to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice".

In March, 1995, after extensive consultation, the Review released its *First Report* which contains 78 recommendations directed at creating the framework for a modern civil justice system. Key components of this framework include the following:

- that courts will become "dispute resolution centres" adopting a "multi-door" concept of dispute resolution and integrating alternative dispute resolution techniques;
- that there will be a province-wide caseflow management system that will process cases in accordance with prescribed time parameters using a team approach;
- that there will be a unified management, administrative and budgetary structure with clear lines of accountability; and
- that there will be a properly funded infrastructure which utilizes modern technology.

Response to the *First Report* has been favourable. The Attorney General, as well as the former and current Chief Justices have stated publicly that they endorse the *Report* and are committed to its implementation.

In the *First Report*, a number of issues were identified requiring further development which were deferred to the Review's final report. The *Supplemental and Final Report* addresses those issues and contains 36 additional recommendations which supplement, rather than supplant, the recommendations made in the *First Report*. The *Supplemental and Final Report* also provides an update on the status of implementation of the *First Report's* recommendations.

PART II STATUS OF IMPLEMENTATION

Implementation of the *First Report* is underway and, currently, is focused on the following areas.

Caseflow Management

A Working Group was constituted to develop a caseflow management process to be implemented across the province. In June 1996, a Final Report, which includes a draft set of Case Management Rules, was submitted to the Task Force. Also in June 1996, legislation was introduced creating the position of Case Management Master (called a "Judicial Support Officer" in the *First Report*) in keeping with the Review's recommended "team" approach to case management. This legislation received Third Reading on October 29, 1996. It is anticipated that, based on the proposed rules, caseflow management will be expanded to Ottawa for 100% of civil cases and to 25% in Toronto in early 1997.

Technology

A broadly representative Civil Justice Technology Advisory Committee was created to provide advice regarding the implementation of information technology initiatives for the civil justice system. Such initiatives include updating the technology necessary to support the expansion of case management, testing the electronic filing of court documents, and pursuing a partnership with the private sector to develop longer term technology solutions for the justice system.

Family Law

A "focus on family law" was the subject of a separate Chapter in the *First Report*. A Working Group, which continues to meet, was established to develop further the Civil Justice Review's recommended "resolution-focused" process for family law in Ontario.

Backlog Reduction

Elimination of the civil backlog, recognized as a prerequisite to the implementation of caseflow management, is well underway. At the instance of the Chief Justice, backlog

reduction plans have been prepared for each Region, which entail travelling teams of designated "backlog" judges.

PART III MAKING THE CIVIL JUSTICE SYSTEM WORK EFFECTIVELY

Case Management Regime and Rules

Civil case management is a centrepiece of the recommendations put forward earlier by the Civil Justice Review and re-enforced in the *Supplemental and Final Report*. Its implementation is essential to the successful fulfilment of the Task Force's "vision" for a modern civil justice system.

A Working Group, established to make recommendations regarding an appropriate province-wide civil caseflow management system, presented its Report to the Task Force in June 1996. The Civil Justice Review endorses this Report in principle.

A summary of the essential features of the case management regime recommended by the Task Force follows.

Case Management Teams: Responsibility for case management will reside with teams consisting of judges, judicial support officers (now to be called Case Management Masters) and case management co-ordinators.

A Single Set of Rules: One set of case management rules would apply to all civil, non-family, actions and applications commenced in the Ontario Court of Justice (General Division).

Court Monitoring Only After Defence: Only defended cases would be administered in order to reduce the time and cost expended by the Court in administering cases.

"Tracks": The proposed system calls for two "tracks" of cases: "standard" and "fast".

The Streamlining of Time Guidelines: Only the following time limits would be applicable:

- attendance at an ADR session within 2 months after the close of pleadings;
- a settlement conference to be held within 3 months after the close of pleadings for fast track cases and within 8 months for standard track cases;
- cases to be at trial within 2 months of the settlement conference.

Integration of ADR and Mandatory Referral: The Review recommends the implementation of early mandatory mediation for all civil, non-family, cases once an adequate body of qualified ADR providers is established. The proposed case management rules have been drafted to provide that mandatory ADR can be easily integrated into the existing rules, as the new system is rolled out across the province.

Three Types of Conferences: The proposed case management system calls for the following three types of conferences: case conferences; settlement conferences; and trial management conferences.

Sanctions: Sanctions are proposed for failure to comply with case management timelines.

Simplified Rules Procedure: Cases falling within the newly implemented Simplified Rules Procedure would be deemed fast track cases and Rule 76.05 (no discovery) would apply.

Technology: Civil case management cannot work without a properly functioning technology base. While it is not the role of the Civil Justice Review to design an automated civil case management system, it is important that the hardware and software needs for running such a system be understood. The *Supplemental and Final Report* sets out a summary of those needs.

Advisory Committee: It is proposed that an Advisory Committee be established to provide advice with respect to the implementation of case management and to monitor how it is working.

Implementation and Transitional Provisions: It is recommended that the proposed case management rules be implemented in each of the pilot project centres and in Ottawa in early 1997, and province-wide by the year 2000. In order to avoid an ongoing backlog of existing cases, transitional provisions would apply.

Alternative Dispute Resolution

In the *First Report*, the Task Force endorsed the concept of court-connected ADR in principle, but deferred consideration of the appropriate service model and funding option until the evaluation of the ADR Centre pilot project had been completed.

The evaluation of the Centre was completed in November 1995 and concluded that referral to ADR provides a cheaper, faster and more satisfactory result for a significant number of the referred cases. Key findings of the evaluation include:

- that 40% of cases referred to mediation result in a settlement in the very early stages of the case (normally within two to three months of the filing of a statement of defence) thereby reducing court caseloads and the costs of litigation;
- that there is strong and broad approval for the availability of ADR as part of the litigation process;
- that there is no significant opposition among lawyers or litigants to the mandatory nature of ADR and that referral to ADR should continue on an 'opt-out' basis after the filing of the first statement of defence.

Integration of ADR into the Case Management Model

The impressive settlement results of the ADR Pilot Project have caused the Task Force to reconsider its earlier view that all defended cases should first go through a screening process with what will now be called a Case Management Master. Based on the findings of the

evaluation, the Review now recommends that there should be mandatory referral to mediation of all types of civil, non-family, cases with a provision for "opting-out" with leave of a Case Management Master or Judge. It is proposed that referral to mediation take place after the first statement of defence has been delivered in order to reduce costs both to the litigant and the court system. Mediation is recommended, as opposed to other types of ADR, because of the established success of that form of ADR in achieving settlements in the early stages of litigation.

In order to ensure a viable overall case management system in the province, the Review believes it is important that the referral to mediation be an integral component of case management. As it is important that the referral to mediation not present new opportunities for delay, the time to complete the mediation session should be integrated into the overall case management timetable and not extend it.

Appropriate Form of Service Model and Funding

The Review recommends that, to ensure the credibility of the mandatory mediation program, it should be court-connected and should operate with a roster of "accredited" private sector mediators. A mixed panel of staff and private sector mediators, however, should be available where there is an insufficient supply of qualified private mediators.

It is proposed that funding of the mandatory mediation program be founded on a cost-recovery rationale, based upon a surcharge added to the filing fees paid by all parties to an action, which would be segregated from the Consolidated Revenue Fund. It is further recommended that, in order to contain the cost of the program and ensure its accessibility, court roster mediators should be paid a regulated fee. The Task Force believes that all participants in the justice system and the public as a whole benefit by a process which leads to earlier settlements and less costly litigation. Accordingly, the cost of funding the program should be borne by all litigants, whether or not the case is defended and actually proceeds to the mediation stage.

Accreditation

It is vitally important that mediators be qualified. At this time, there are different views concerning the requirements necessary to constitute an "accredited" mediator and further consideration of appropriate standards is required. Accordingly, the Task Force recommends that a consultation process be established which will lead to the development of standards and an accreditation process for ADR providers within a one year period.

In the interim, prospective court roster mediators should be required to submit to an application procedure in which mediation training and experience, as well as knowledge of the court process, are assessed. The Task Force proposes that the ADR Project Steering Committee be authorized to develop criteria for this assessment process and that local Advisory Committees be struck to review prospective mediator applicants based on those criteria.

ADR and Family Law

Unlike the delivery model for civil cases, the Task Force does not recommend, at this time, that all family law cases be referred to mediation after a case is defended. The "early resolution focused" process for family law recommended in the *First Report*, however, creates opportunities at both the pre- and post-application stages to integrate ADR services within a case managed environment.

While the Task Force recommends a surcharge to fund mediation in civil matters, such a funding mechanism is problematic in family law as one of the three courts that currently deals with family matters does not impose any fees. Accordingly, it is proposed that the funding mechanism for family law cases be "user-pay", with some provision for *pro bono* services.

Consideration must also be given to the appropriate role of ADR in child protection matters. Despite the historic resistance, there is growing evidence that mediation can be a useful tool in child protection cases. Accordingly, it is recommended that a Task Force be established to design a mediation process for child protection cases that would include

appropriate case referral criteria.

Venue

As discussed in the *First Report*, "venue" raises a number of difficult issues concerning the current ability of litigants to determine where their proceedings should be dealt with, and the allocation of judicial and court resources in the province generally. At present, certain court centres are faced with backlogs of civil cases when, within reasonably short distances, there exist facilities and resources which are being under-utilized.

Concerns have been expressed that parties and witnesses are being inconvenienced by the lack of venue rules, as many actions are being commenced in the province's major centres simply because the originating party's lawyer practices in the area. This makes it difficult to plan an efficient use of courts and staffing.

In order to address these problems, the Task Force recommends that venue provisions be reintroduced in Ontario law, and that there be provision for the judicial transfer of cases aided by prescribed guidelines.

Small Claims Court

Although the Task Force made a number of recommendations regarding the Small Claims Court in the *First Report*, it was felt that a more in-depth analysis of the small claims issue should be deferred pending the evolution of the Simplified Rules initiative and the completion of a study by the Fundamental Issues Group.

The Simplified Rules initiative has been enacted on a pilot basis; however, information is not yet available to assess its impact. The study by the Fundamental Issues Group has now been completed and points to the need to address broad policy issues concerning the objectives of a small claims process before making final decisions concerning the appropriate type of forum and procedures. We agree. This is a task, however, that extends beyond the Civil Justice Review's mandate to propose "specific and implementable" solutions to existing

problems in the system. Accordingly, we propose that a broadly representative Task Force be established to conduct this work and to make specific recommendations in this regard.

There are, however, issues respecting small claims that can be addressed in the interim. These are discussed below.

Monetary Jurisdiction

Concern has been expressed that the court's current monetary jurisdiction of $6,000 is too low and that the public do not have access to a forum for the economical resolution of smaller claims in excess of that amount. The Review is of the view, however, that any increase in the monetary limit of the Small Claims Court should be postponed until there has been a formal evaluation of the Simplified Rules initiative. The expectation is that the General Division will become more economically accessible for litigating such claims and, as a result, an increase in the monetary jurisdiction of the Small Claims Court may become unnecessary. The Review also believes it is important to establish baseline data on the current operations of the Small Claims Court prior to any increase in jurisdiction.

The Presence of Lawyers in the Small Claims Court

It has been suggested that, in order to preserve the "people's court" character of the Small Claims Court, lawyers should be excluded from appearing at trial. Legal representation is said to result in a greater level of formality in the court and to impose increased pressure on the other party to hire a lawyer. Two studies of Small Claims Courts undertaken by the U.S. National Center for State Courts (known as the "National Studies") have concluded, however, that there is no such basis to exclude lawyers.

The Review concurs with this conclusion and recommends that Small Claims Court litigants not be deprived of the right to decide whether to use a lawyer. In making this recommendation, however, the Task Force is aware that legal costs in the Small Claims Court can reach a level that is disproportionate to the amount at stake. Accordingly, it is recommended that lawyers' fees be limited to a maximum of 40% of the jurisdiction of the

Small Claims Court.

The Presence of Businesses in the Small Claims Court

It has also been suggested that the presence of business litigants in the Small Claims Court detracts from its "people's court" character and deters individuals from using the court. This perception was tested as well by the National Studies, which found it not to be the case. Based on these findings, the Review is of the view that businesses should not be excluded.

Deputy Judges

During the consultation process, concerns were raised about a perceived inconsistency in decision-making on the part of Deputy Judges. The Task Force is of the view that this inconsistency is at least partly due to the lack of training Deputy Judges receive. It is recommended that Deputy Judges receive mandatory training with respect to their role as Small Claims Court Judges. In addition, they should receive instruction in consumer claims, poverty law issues and case management.

The present system of appointing Deputy Judges has also received some criticism. Concern has been expressed, for example, that the present system is too informal and candidates are not adequately screened. The Task Force is of the view that there should be a formal recruitment process in place and that appropriate selection criteria should be established.

Access to Information

Having understandable information about the Small Claims Court readily available throughout the province is an important component of ensuring access to justice. The Task Force recommends that such information should be available to the public in "plain language" and in a variety of mediums, languages and formats.

Construction Liens

Further to the Task Force's recommendation in the *First Report*, a Working Group consisting of representatives of the Judiciary, the Masters, the Ministry, the Construction Bar

and the construction industry met in December 1995 to review the recommendations of the Advisory Committee on the Alternative Resolution of Construction Disputes and other matters related to construction litigation. The Review also received a further submission from the Construction Law Section of the CBA-O.

Based on this additional input, the Task Force recommends that, as construction lien matters are factually and legally complex, there should be a specialized list for such cases. Who should be assigned to hear these matters -- for example, whether a Judge, Master or Case Management Master -- should be left to the discretion of the Chief Justice.

Further, the Task Force believes that construction lien cases should be case managed and that, to accommodate this, the timeframes in the *Construction Lien Act* and in the proposed civil case management rules should be aligned as far as possible to ensure compatibility. As well, it is proposed that construction lien cases, like other civil cases, should be subject to early mandatory referral to mediation.

Landlord and Tenant Matters

In the *First Report*, the Task Force identified a number of problems with the resolution of landlord and tenant disputes in the courts and recommended that an administrative tribunal option be considered, should the constitutional impediment to that option be removed. In February 1996, the Supreme Court of Canada released its decision in *Re Residential Tenancies Act, (N.S.)* which appears to make this option available.

Benefits associated with an administrative process include increased accessibility through less formal procedures, and the earlier resolution of disputes by incorporating alternative dispute resolution techniques such as mediation. In designing an appropriate process, the Review stresses the importance of taking into account concerns that have been raised about conferring responsibility for landlord and tenant matters to an administrative tribunal.

While not recommending the exact nature and form of an administrative process, the Task Force proposes that it should incorporate certain characteristics, for example:

- that it should be a single process before an independent tribunal with exclusive jurisdiction of first instance, with a right of appeal to the Divisional Court;
- that the tribunal should actively manage cases, rather than simply adjudicate, and that an early mediation process should be an important component;
- that the tribunal should be adequately funded and properly staffed, and should incorporate informal, easily understood procedures which are broadly communicated.

Enforcement

In the *First Report*, recommendations relating to enforcement activities were deferred pending further comment on the following issues.

Warrants of Committal

The Small Claims Court is the only civil court where such a drastic remedy as a warrant of committal can be readily obtained. The current procedures dealing with these warrants lead to the perception that they are issued for non-payment of the judgment debt, as opposed to contempt of court for not appearing at a judgment debtor examination for non-payment. The Task Force is of the view that imprisonment for contempt in this context is inappropriate and recommends that less draconian options be considered.

Service Requirements

Notwithstanding a number of recent changes to service requirements, there continues to be varying, and sometimes conflicting, rules with respect to the service of court documents. Accordingly, the Task Force proposes that a comprehensive review of all service rules be undertaken with the objective of ensuring consistency and optimizing the use of modern, effective and low-cost methods of service.

The Enforcement of Judgment Debts

Debtor-creditor law in Ontario is currently governed by a number of different statutes

and has been described as "fragmented, ambiguous, incomplete and archaic". Enforcement processes in the different courts are inconsistent and complex.

Reform of this area of civil law is critically needed and it is recommended that an appropriate strategy be developed. As part of that strategy, consideration should be given to integrating enforcement measures under a single statute which would create a central enforcement office responsible for the coordination and operation of all enforcement activities for all levels of court. In addition, the privatization of enforcement activities should be considered.

Discoveries

As discussed in the *First Report*, while examinations for discovery are considered to be a critical component in the conduct of litigation, concerns have been expressed that they have become too time-consuming and costly to continue without some controls. We noted that the cost of discovery to a litigant who participates in an average 3-day trial is approximately $7,000 in legal fees, which does not include the costs associated with discovery-related motions that are often brought. A contributing factor to the growing length of examinations, and the corresponding increase in cost, is the current broad scope of pre-trial disclosure and discovery.

While the Task Force has received a number of suggestions for addressing the problems associated with the discovery process, we believe that a more indepth study of this issue is needed. Accordingly, it is recommended that the Civil Rules Committee constitute a Working Group to make recommendations concerning the current Rules of Procedure governing discovery with the objectives of preserving its essential disclosure principles while improving its economic effectiveness.

Family Law

In our *First Report*, a "resolution focused process" for family law was recommended to address the many concerns raised during the consultation stage of the Review with respect to family law. A Family Law Working Group subsequently was constituted for the purpose

of developing and implementing this proposed process.

The Family Law Working Group has made significant progress towards the implementation of the new resolution focused process. A brief summary of the proposals which the Civil Justice Review endorses is set out below.

Case Management: The Working Group supports the adoption for family law cases of the 180 day timetable recommended by the Civil Case Management Working Group, subject to the statutory exceptions set out in the *Children's Law Reform Act* and the *Child and Family Services Act*, and agrees with the Review's earlier recommendation that a mandatory case conference take place *before* interim relief is sought.

Family Law Committees: The Working Group has pursued the Review's recommendation that local and regional family law committees be established and has created a comprehensive database of all existing Family Law Committees.

Streamlined Processes: As there are constitutional impediments to granting uncontested divorces using a purely administrative mechanism, the Working Group is considering other options for streamlining this process and making it more accessible and less costly. The development of standard, simplified court documents has been deferred by the Group in light of the work undertaken in this regard by the Family Rules Committee.

Information Services: North American research considered by the Working Group supports the Review's recommendation that the viewing of an information video dealing with family law matters be a mandatory pre-condition to entering the family law court process and has prepared a video outline.

Expansion of the Family Court: The Family Law Group is in agreement that the expansion of the Unified Family Court should continue.

Mediation: The Group has not reached a consensus regarding the concept of mandatory referral to mediation in the family law area, although it has agreed that mediation services currently provided in the expanded Family Courts should be generally available.

Legal Aid: The Working Group intends to pursue issues related to the changing legal aid environment and to make recommendations with respect to unrepresented litigants.

While the Working Group has made considerable progress, it has been unable to reach a consensus in several difficult areas with respect to case management and ADR. The controversial nature of these issues has highlighted the complexities of family law generally and the difficulty of properly addressing this area of the law in the context of a general civil justice review. Accordingly, the Task Force recommends that a "Family Justice Review" be undertaken which, building on the work of the Civil Justice Review and the Family Law Working Group, would consider these and other family law issues and involve broad consultation.

Cost of Civil Justice

Cost Research

In our *First Report*, we recommended that a research project be commissioned to consider the "cost" of justice, both from an institutional perspective and from the perspective of litigants. While the Ontario Law Reform Commission had planned to undertake this study, news of its discontinuance was received prior to beginning the project.

We believe strongly that this research should proceed and recommend that the Ministry of the Attorney General establish a Working Group with the mandate of completing this work within one year. We further recommend that, as part of the study, the Working Group consider alternatives to the billable hour for establishing lawyers' fees.

Contingency Fees

During the consultations, members of the public expressed concern about the high costs of civil justice which they attributed in part to the current billing practices of lawyers. One alternative frequently recommended was contingency fees.

With the exception of criminal and family proceedings, contingency fee arrangements should be permitted in Ontario. At present, Ontario is the only Canadian province that does not permit contingency fees. In making this recommendation, however, the Review is aware of the potential for abuse and the need to ensure adequate safeguards are in place.

Enhancement of Participation in the System

While it is clear that the public is very interested in participating in the civil justice system, concerns have been expressed that the current vehicles for such participation -- the Ontario Courts Management Advisory Committee (OCMAC) and the Regional Courts Management Committees (RCMACs) -- are not being utilized to their full potential.

The Task Force continues to believe that these Committees are important components of the justice system in Ontario: the participatory process they bring to the justice system and the potential vehicle they provide for public input are vitally important.

However, in supporting the continuation of these Committees, the Review acknowledges the need for them to be revitalized. In this regard, it is recommended that a number of recommendations arising out of a Joint OCMAC/RCMAC Planning Session be adopted including extending the terms of Committee member and ensuring that a mentorship and training program are implemented. It is further recommended that there should be regular liaison between these Committees and local Bench and Bar Committees, as well as greater access by community groups.

LIST OF RECOMMENDATIONS

For ease of reference, the recommendations contained in the *Supplemental and Final Report* are organized by chapter under the various headings where they are found in the *Report*. The recommendations begin in Part III of the *Report*.

PART III

Chapter 5: MANAGEMENT OF CASES

5.1 Case Management Regime and Rules

1. That a province-wide system of case management for civil cases, as described in Chapter 5.1, be implemented in Ontario, and that the draft set of case management rules contained in Appendix 2 be enacted (with the modifications noted in Chapter 5.1) to effect that result; the proposed system of case management and rules to encompass at least the essential elements as described herein, namely:

   - Case Management Teams, consisting of Judges, Case Management Masters and Case Management Co-ordinators;
   - a single set of Case Management Rules for all civil (non-family) actions and applications commenced in the Ontario Court of Justice (General Division);
   - court monitoring only after defence;
   - two "tracks" of cases, namely a "fast" track and a "standard" track, with flexibility for dealing with cases requiring more intensive case management built into the system through the case conference mechanism;
   - the streamlining of time guidelines through the provision of only two mandated time limits, namely,
     a) an ADR Session within 2 months of the filing of a first response; and,
     b) a Settlement Conference within 3 months of the filing of a first response for fast track cases and within 8 months for standard track cases;
   - sanctions for failure to comply with case management timelines, including the imposition of costs, the dismissal of actions and the striking out of pleadings and affidavits;
   - the integration of ADR and mandatory referral of all civil (non-family) cases to

mediation after the close of pleadings;

- three types of conferences, namely a case conference, a settlement conference, and a trial management conference;
- automatic dismissal of proceedings for cases where no defence is filed or steps taken by the initiating party to obtain judgment within 6 months of initiation of the proceedings;
- fast track treatment for Simplified Rules cases; and,
- a properly functioning technology infrastructure with the minimum hardware and software features described in Chapter 5.1.

2. That the proposed civil case management rules apply to all actions and applications commenced after the "implementation date" of case management in accordance with the direction of the Chief Justice.

Further that, in order to avoid an ongoing backlog of existing cases, the following transitional provisions should apply to proceedings commenced before the implementation date, namely that:

(i) if the proceeding is undefended the initiating party should have 6 months from the implementation date to move for judgment or the case will be automatically dismissed by the Registrar; and,

(ii) if the proceeding is defended, a Settlement Conference should be arranged within 12 months from the implementation date or the case will be automatically dismissed by the Registrar; and that,

(iii) if other transitional issues arise in the case, they be dealt with by a Judge or Case Management Master in the context of a case conference.

3. That a Civil Case Management Advisory Committee be established, composed of representatives of the Bench, Bar, Ministry and Public, to develop plans for the implementation and roll-out of case management across the Province, to monitor the operation of the case management system and the rules, and to recommend to the appropriate authorities, including the Civil Rules Committee, changes in policies and

procedure necessary to facilitate case management.

4. That the proposed case management rules be implemented in Windsor and Sault Ste Marie (two of the pilot project centres), and in Ottawa in early 1997, that Toronto (the third pilot project centre), which is presently operating on a basis of 10% case management, expand to 25% by early 1997 and move towards 100% on a graduated basis. Finally, that the province-wide roll out of case management be completed by January 1, 2000.

5.2 Alternative Dispute Resolution

5. That there be mandatory referral of all civil, non-family, cases to a three hour mediation session, to be held following the delivery of the first statement of defence, with a provision for "opting-out" only upon leave of a Judge or Case Management Master. The session should be conducted by a mediator selected by the parties from a list of accredited mediators or, failing agreement by the parties, by a mediator selected from that list by a Judge or Case Management Master.

6. That court-connected mandatory referral to mediation operate with a roster of accredited private sector mediators and that a mixed panel of staff and private sector mediators be made available in those locations where there is an insufficient supply of qualified private sector mediators.

7. That the court-connected mediation program be funded on a cost recovery basis from filing fees paid by all parties to an action.

8. That, in order to contain the cost of a court-connected mediation program and ensure its affordability and accessibility, court roster mediators be paid a regulated fee.

9. That the Ministry of the Attorney General and Ministry of Finance should investigate the possibility of imposing an ADR surcharge or some other regulatory scheme in order

to segregate the ADR filing fee or surcharge from the Consolidated Revenue Fund.

10. That a Working Group comprised of representatives of the Ministry of the Attorney General, the Judiciary, the Bar and the Public be established to consider the matter of court fees and to develop principles and procedures with regard to establishing their amount.

11. That the Government of Ontario, in conjunction with the Court, the Bar, ADR service providers and the consumers of such services, establish a consultation process which will lead to the development of standards and an accreditation process for ADR providers in Ontario, with a view to having such standards and accreditation process in place within a one year period.

That in the interim, until such time as a province-wide process is in place, prospective court roster mediators be required to submit to an application procedure in which mediation training and experience, as well as knowledge of the court process, are assessed. The ADR Project Steering Committee should be authorized to develop criteria for this assessment process, and Local Advisory Committees should be struck to review prospective mediator applicants based on those criteria, and to implement and monitor court-connected ADR programs where established.

12. That with respect to ADR in family law matters, as recommended in the *First Report*:

- ADR be considered at both the pre- and post- application stage of the proceedings;
- that, at the pre-application stage, potential family litigants be required to consider the use of ADR and indicate in the originating process whether they have used ADR techniques and, if not, why;
- that, at the post-application stage, the appropriateness of referral to ADR be considered at an early mandatory case conference to be held within two weeks of the deadline for the filing of the Response.

13. That mediators used for family law matters must be on a court approved roster, and further that, as a condition to being on the roster, family law mediators be required to provide services at a regulated fee, as well as *pro bono* services for those clients who cannot afford to pay.

14. That with respect to ADR in child protection cases:

- a Task Force be established to design a mediation process appropriate for child protection cases, including the establishment of province-wide criteria for case referral;
- that, at this time, referral to mediation in child protection cases be voluntary and the consent of all parties be required;
- that the government pilot and evaluate the results of child protection mediation in at least three sites in the province;
- that a joint educational initiative be established directed at the family bar and child welfare personnel on the subject of mediation in child protection matters;
- that the government consider amending the *Child and Family Services Act* to facilitate access to mediation at any point in the court process, but respecting the principle of early intervention;
- that mediators used for child protection cases must be on the court roster and must have specific child welfare training.

5.3 Venue

15. That situs provisions be reintroduced into Ontario law. These situs provisions should be of both general and specific application and apply to both actions and applications. There should be a venue provision of general application such as former Rule 245 for proceedings not subject to specific situs provisions.

16. That the Regional Senior Justices should be given the authority to transfer cases to a different location for hearing or for trial, subject to the following considerations:

(a) An order transferring a case to another location should not be made without notice to the parties and without an opportunity for them to be heard. In making

an order for change of venue, the judge should take into consideration the following factors:

- cost to the parties;
- the parties' place of residence;
- where the cause of action arose;
- the availability of judges or trial dates at the proposed transfer location;
- the witnesses' place of residence;
- the need for special facilities;
- the distance to the proposed transfer location;
- the length of the proposed trial or hearing; and
- any other relevant factor.

(b) Transfers between regions should be ordered only in exceptional cases, and provided the Regional Senior Justice of the region to which it is proposed the case be transferred has consented.

CHAPTER 6: SPECIFIC AREAS

6.1 Small Claims Court

17. That a Task Force be established to review the policy objectives and context of small claims dispute resolution in Ontario and the appropriate type of forum and process for the resolution of such disputes, and to make specific proposals in that regard.

18. That at the present time the monetary jurisdiction of the Small Claims Court remain at $6,000. Any consideration of an increase in jurisdiction of the Small Claims Court should await the results of the formal evaluation of the Simplified Rules initiative.

That pending the release of this evaluation, an empirical study be undertaken to establish baseline data on the current operations of the Small Claims Court. This study should include an evaluation of the Small Claims Courts at three sites across the province. The three sites should represent a large urban centre, a medium centre, and a smaller rural centre. This study should be completed and evaluated prior to any

increase in the jurisdiction of the Small Claims Court being implemented.

19. That lawyers, agents, and paralegals should not be excluded from representing parties in the Small Claims Court.

20. That lawyers' fees be limited to a maximum of 40% of the jurisdiction of the Small Claims Court (currently $6,000). The lawyer would be entitled to compensation up to this maximum (which would currently be $2,400), subject to an agreement to accept a lesser amount, regardless of the outcome in the case.

21. That businesses, such as collection agencies, should not be excluded from using the Small Claims Court.

22. That supplemental to Recommendation 48 in the *First Report*, training of Deputy Judges should include instruction in:

- a standardized approach to the hearing and disposition of Small Claims Court matters;
- consumer claims including applicable legislation;
- poverty law issues; and
- case management.

23. That a formal recruitment process for Deputy Judges be established and that candidates be screened with regard to the following criteria:

- membership in good standing of the Law Society of Upper Canada;
- a minimum number of years of legal experience;
- mediation experience;
- community service;
- professional reputation;
- an ability to take an active case management approach; and

- an ability to deal with unrepresented litigants.

24. That the "How to Make Small Claims Court Work for You" brochure be available in languages other than English and French.

That in addition to providing information on the Internet, experiments be conducted in providing information on the Small Claims Court through interactive electronic kiosks in shopping malls, community centres, town halls and libraries.

25. That a Working Group, which includes users of the Small Claims Court, be established by the Chief Justice and the Attorney General to make recommendations within 6 months of its creation with regard to:

- court processing standards for the disposition of Small Claims Court cases;
- evaluation processes to measure public satisfaction with the processes in place; and
- appropriate membership on the Small Claims Court Rules Subcommittee.

6.2 Construction Liens

26. That with respect to construction lien matters:

- construction lien cases should be case managed;
- the timeframes contained in the *Construction Lien Act* and in the proposed civil case management rules should be aligned as far as possible to ensure compatibility; in this regard, that the Construction Law Section of the Canadian Bar Association - Ontario be asked to consider this matter and report to the Ministry of the Attorney General with an appropriate proposal;
- construction lien cases, like other civil cases, should be subject to mandatory referral to mediation after a defence has been filed;
- there should be a specialized list for construction lien cases to ensure that they are dealt with quickly by knowledgeable people;
- it should be left to the discretion of the Chief Justice who should be assigned to hear these matters (i.e. whether Judges, Masters, or Case Management Masters) and the practice may differ from place to place.

6.3 Landlord and Tenant Matters

27. That an administrative tribunal for the resolution of landlord and tenant disputes be implemented in Ontario.

28. That while the Task Force is not in a position to recommend the exact nature and form of an administrative process, it should include the following characteristics:

- it should be a single process before an independent tribunal with exclusive jurisdiction of first instance;
- there should be a right of appeal to a single judge of the Divisional Court on questions of fact and law, with no automatic stay pending appeal;
- the tribunal should actively manage cases, rather than simply adjudicate, with the objective of ensuring the most expeditious and effective resolution of the dispute; in this regard, an early mediation process should be an important component;
- the tribunal should enhance public access by ensuring that its procedures are simple, easily understood, and responsive to the unique characteristics of such disputes and that information about its procedures are clearly and broadly communicated;
- the tribunal should be adequately staffed; adjudicators should be broadly representative of the Ontario public, properly trained, with demonstrated expertise and understanding of the unique issues in this area; similarly, its administration must be staffed by qualified and trained personnel at all levels;
- the tribunal must be properly and adequately funded from the outset to ensure its credibility and integrity and to guard against the crippling consequences of operating in a backlog environment.

6.4 Enforcement

29. That imprisonment as a sanction for contempt of court in the Small Claims Court, where the contempt relates to the non-payment of a judgment debt, be reconsidered with a view to imposing a less intrusive sanction.

30. That the Ministry of the Attorney General undertake a comprehensive review of all

service rules with the objective of ensuring consistency in service requirements and optimizing the use of modern, effective and low-cost methods of service.

31. That the Ministry of the Attorney General review the Ontario Law Reform Commission's *Report on the Enforcement of Judgment Debts and Related Matters*, as well as the enforcement reform initiatives in Alberta, New Brunswick and Newfoundland, with a view to recommending the implementation of those reforms considered appropriate within 6 to 9 months, with consideration to:

- proposing new legislation to establish a reorganized, comprehensive and coordinated enforcement system for the enforcement of judgment debts, integrating virtually all enforcement measures under a single statutory regime;
- establishing a new central enforcement office under the supervision and control of a court official;
- proposing uniform statutory and regulatory provisions and operational practices to govern the enforcement of money judgments from every court level; and
- designing a system which identifies the body which is responsible and accountable and includes sufficient safeguards and regulatory controls to protect against abuses.

That the Ministry be guided in this review by the following set of principles articulated by the Alberta Law Reform Institute:

1. Universal Eligibility: All the debtor's property should be subject to enforcement except property that is deliberately exempted;

2. Just Exemptions: Deliberately exempted property should be sufficient to permit debtors to maintain themselves and their dependents with the necessaries of life;

3. Creditor Initiative: The enforcement process should be creditor-driven, rather than being dependent on the initiative of a government official;

4. One Statute: The enforcement process should be governed by one statute that describes the system of enforcement and its various processes in a consistent, coherent and logically ordered way;

5. Judicial Supervision: Judicial supervision should be kept to a minimum, but parties should have easy access to the court when they require it; and

6. Imprisonment for Debt: Imprisonment should not be, or seen to be, a remedy for the enforcement of money judgments.

Further that the Ministry should consult with those with expertise in this area, including consumer groups, collection agencies, the Bench, the Bar, Courts Administration, and the private sector.

6.5 Discoveries

32. That the Civil Rules Committee constitute a Working Group to consider and make recommendations concerning the current Rules of Procedure governing the discovery process with the objectives of preserving its essential disclosure principles while improving its economic effectiveness.

CHAPTER 7: FAMILY LAW

33. That a Family Law Review be undertaken to consider all family law issues, which would build on the work of the Civil Justice Review and the Family Law Working Group, and which would involve consultation with representatives of all constituencies in this area including the family law Bench, Bar and members of the Public who have participated in family law proceedings.

CHAPTER 8: COST OF CIVIL JUSTICE

8.1 Cost Research

34. That the Ministry of the Attorney General, in conjunction with the Judiciary, the Bar, and the Public, establish a Working Group to study the question of the "cost" of justice, both from an institutional or systemic perspective and from the perspective of individual litigants, with a view to completing a report within one year of the creation of the Working Group.

Further that the Working Group include in its study, in particular, the question of alternatives to the billable hour as a mechanism for establishing lawyers' fees, including

the concept of "results based" or overall value for services based billing.

8.2 Contingency Fees

35. That contingency fee agreements be permitted in Ontario in all matters except criminal and family proceedings. Further, that a standard form agreement be used, which includes notice to the client of their right to have the agreement reviewed by the Court.

CHAPTER 9: ENHANCEMENT OF PARTICIPATION IN THE SYSTEM

36. That, as recommended in the *First Report*, OCMAC and the RCMACs be recognized and accepted by the Bench, the Ministry, the Bar and the Public as an important piece of the justice structure in Ontario, and that efforts be made to ensure that their mandate to consider and recommend policies and procedures to promote the better administration of justice and the effective use of human and other resources in the public interest, be duly carried out.

Further, that with respect to OCMAC and the RCMACs:

- there be sufficient administrative staff to support and co-ordinate the work of these Committees, including following up on Committee recommendations;
- that the terms of the Public and Bar members be extended to three years;
- that the duties of the Chair be regularly rotated among Committee members;
- that annual meetings be held to review the status of Committee recommendations, set agendas for the next year, and assess the Committee's performance;
- that there be more input and access to these Committees by community stakeholders by inviting formal written submissions or presentations from interested groups;
- that a formal orientation program be developed, in consultation with the Regional Senior Justice and Courts Administration, to familiarize newly-appointed members to the Committees;
- that there be regular liaison between these Committees and local Bench and Bar Committees in order to identify justice system issues and to arrive collaboratively at the most effective solutions.

Part I

BACKGROUND AND VISION

CHAPTER 1

HOW WE GOT TO WHERE WE ARE

> I cannot over-emphasize the critical importance of this *First Report of the Civil Justice Review*. The civil justice system in Ontario is in crisis. As well as the increasing cost, the system is labouring under the tremendous weight of a growing backlog of cases, and a serious lack of adequate resources. Litigants must wait an inordinate length of time to resolve their civil disputes. Significant initiatives are absolutely essential if our court is to be able to provide timely and affordable justice to the citizens of this province.
>
> Chief Justice R. Roy McMurtry[1]

1.1 THE CIVIL JUSTICE REVIEW

The Civil Justice Review was established in April 1994 at the joint initiative of the former Chief Justice of the Ontario Court of Justice and the former Attorney General for Ontario, to address the twin problems of expense and delay threatening the civil justice system, and to propose "specific and implementable solutions" to those problems. Its mandate is:[2]

> [T]o develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilisation of public resources allocated to civil justice.

On March 9, 1995, after a year of intensive consultation, the Civil Justice Review released its *First Report*.[3] The *First Report* contains 78 recommendations which collectively constitute our vision of how the modern civil justice system should operate. While we

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[1] The Honourable R.Roy McMurtry, former Chief Justice of the Ontario Court of Justice, General Division, and current Chief Justice of Ontario, Remarks on the *First Report of the Civil Justice Review* (March 9, 1995) [unpublished].

[2] *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995), at p.3 [hereinafter "*First Report*"].

[3] *Id.*, at p.113.

recognize that this vision may seem ambitious, we are confident that the recommendations made in our *First Report*, and those we make in this our *Supplemental and Final Report*, are sufficiently "specific and implementable" that the Government and the Court can act immediately upon them. Indeed, steps have already been taken to do so.

In the *First Report,* the members of the Review identified certain criteria or benchmarks against which we felt our recommendations should be measured. We see these criteria as the legitimizing principles underlying a modern civil justice system. They are:

- fairness
- affordability
- accessibility
- timeliness
- efficiency and cost-effectiveness
- accountability, and
- a streamlined process and administration

1.2 RECAP OF "THE MODERN CIVIL JUSTICE SYSTEM IN 10 YEARS: WHAT WILL IT LOOK LIKE ?"

The *First Report* sets out a framework for the modern civil justice system as we envisage it should look like in ten years' time.[4] The concept was to design a civil justice system which takes new ideas about dispute resolution and about effective management and administration of the justice system, and combines these with the important axioms upon which a "just" system is based, while employing modern technology and a sound funding structure to make them effective.

For the Civil Justice Review, this process involved not only the creation and development of new solutions, but also the co-ordination and integration of a number of civil reforms already being experimented with in such areas as case management, alternative dispute

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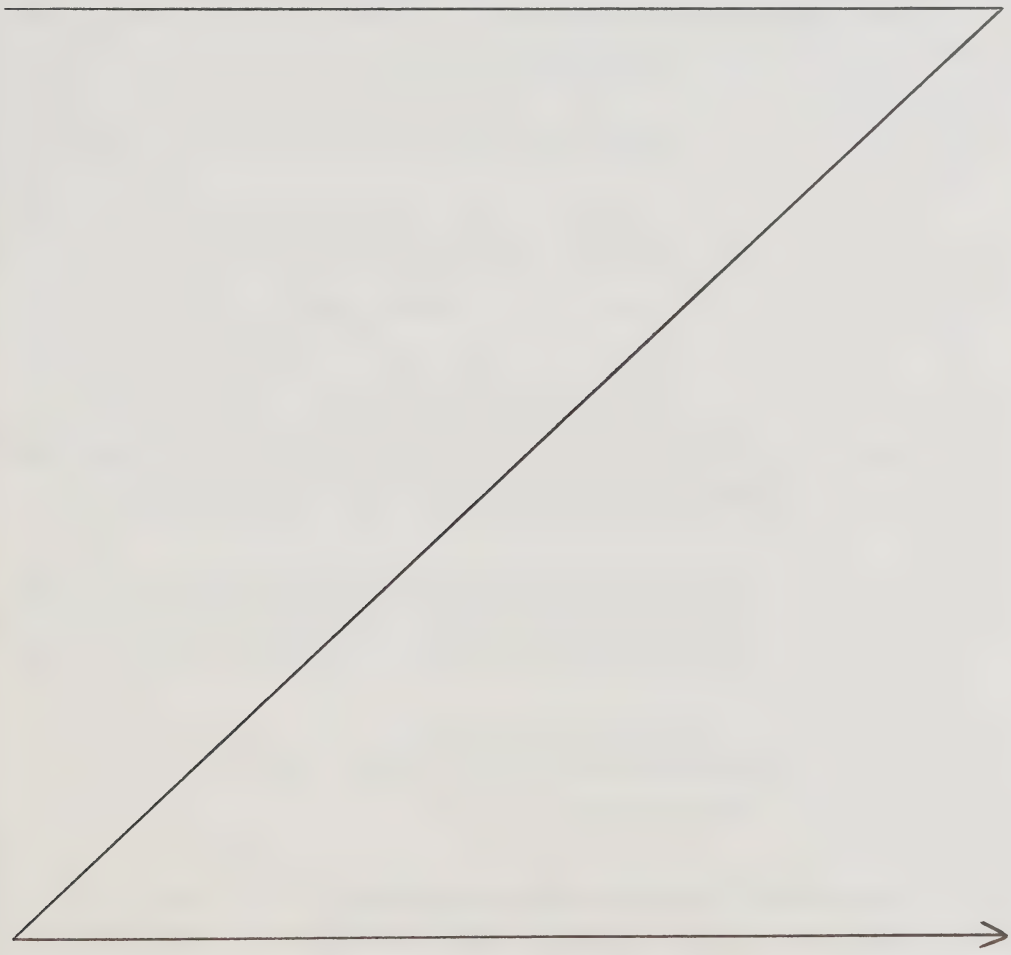
[4] *Id.*, at p.19.

resolution and new technology. The distinctive feature of the *First Report* is its recommendation of a framework for the modern civil justice system that combines and weaves all of these "strands" or concepts into an integrated whole.

Since this framework provides the context for the recommendations contained in our *Supplemental and Final Report* as well, we set it out here again, for emphasis and clarity:



THE MODERN CIVIL JUSTICE SYSTEM IN 10 YEARS: WHAT WILL IT LOOK LIKE ?

1. It will focus on **DISPUTE RESOLUTION AS A WHOLE,**
2. Centering on a **"MULTI-DOOR CONCEPT",** and
3. Featuring an **INDEPENDENT AND CIRCUITING COURT,** employing **CASE FLOW MANAGEMENT** as the vehicle for:

    - **screening** cases into appropriate streams;
    - processing those cases in accordance with given **time parameters which will be enforced;**
    - **integrating** the various **dispute resolution techniques** and **case management mechanisms** ***into a co-ordinated whole***; and,
    - encouraging **early resolution;** while,
    - **utilising** the **right blend of** judicial, quasi-judicial and administrative **personnel** to do so.

4. **Small Claims and Landlord and Tenant** matters will be dealt with **separately and in a more simplified fashion.**

5. **Underpinning all** of this will be **a strategically and properly funded infrastructure** of *facilities,* computer and electronic *technology* and *properly trained personnel*, all administered through,

6. **A unified management, administrative and budgetary structure** with clear lines of responsibility and accountability; and finally,

7. The system will be made as **simplified and understandable** as reasonably possible, and will provide methods to incorporate **public participation** and accountability in a legitimate way.

Our conclusions have been re-affirmed not only by our own deliberations leading to this *Supplemental and Final Report*, but also by others who have made similar recommendations after conducting similar enquiries in other jurisdictions. In this respect, we note particularly the highly regarded recommendations of The Woolf Inquiry in the United Kingdom,[5] and the sweeping pan-Canadian study recently released by the Canadian Bar Association under the leadership of Ms. Eleanore Cronk.[6]

1.3 OVERVIEW AND PURPOSE OF THE *SUPPLEMENTAL AND FINAL REPORT*

The recommendations contained in the *Supplemental and Final Report* are intended to supplement, not supplant, the recommendations made in our *First Report*. Indeed, the recommendations made in the *First Report* form the foundation and basis for the *Supplemental and Final Report*.

We noted in the *First Report* that many of its recommendations could be implemented immediately. The transmittal letter to the Chief Justice and the Attorney General stated:

> Although this document is only our first report, we feel strongly that the implementation process recommended should begin now. In our view, it will not be necessary to await the results of our Final Report before initiating action. The task ahead of us is enormous. We need to get on with the plan for implementation while the window of change remains open.

We are pleased to note that a number of our recommendations are in the process of being implemented. A full report on implementation is set out in Part II of this Report.

At the same time, it was recognized throughout the *First Report* that there were various

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[5] The Right Honourable the Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (July, 1996).

[6] *Systems of Civil Justice Task Force Report* (The Canadian Bar Association, August 1996).

aspects of the civil justice framework which needed to be dealt with further, including:[7]

a) issues surrounding the cost of justice, both from an institutional or systemic perspective, as well as from the perspective of individual litigants;

b) legal aid;

c) the form of service model and funding options with respect to court-connected ADR;

d) the criteria for determining the allocation of judicial resources;

e) implementation of the family law recommendations;

f) methods of streamlining the examination for discovery process and making it more cost-effective;

g) venue (place of trial);

h) enforcement procedures;

i) small claims;

j) landlord and tenant matters;

k) effective ways of dealing with construction liens; and,

l) issues relating to records management in the civil justice system.

Most of these issues will be dealt with in Part III of this Report. With the exception of some further comments respecting contingency fees, however, we do not intend to elaborate further on the general question of the cost of civil justice or on the issue of legal aid. Nor do we intend to address the criteria for determining the allocation of judicial resources. The consultation process following the release of the *First Report* and further research have led us to realize that these issues are beyond the scope of our mandate to recommend "specific and implementable solutions" and, moreover, cannot be adequately dealt with within the timeframe of this review.

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[7] *First Report*, *supra*, note 2, at pp. 405 - 406.

In spite of this, however, we believe it is important that these issues be actively pursued. With respect to legal aid, this has already occurred to some extent since our *First Report*; this issue has been and continues to be a centre of controversy in the profession and in the public domain, and the Civil Justice Review feels that it cannot productively add to the debate at this time. In relation to the question of establishing criteria for determining the allocation of judicial resources to the provinces, the federal government has undertaken and is currently in the process of conducting such a study. We see no point in duplicating this work. Finally, with respect to the elusive subject of the "cost of civil justice", we will recommend in Chapter 8 that this matter be pursued by the Ministry of the Attorney General, in conjunction with the Bar, the Public and the Bench, through some vehicle other than the Civil Justice Review.

Under the Terms of Reference for the Civil Justice Review, the Fundamental Issues Group was charged with conducting research and formulating proposals with respect to issues of longer-range implications for the civil justice system. Some of these issues include:

a) the role and function of civil juries;

b) the question of how the superior trial court can most appropriately and effectively carry out its mandate in dealing with civil cases, in terms of the way in which various types of cases are processed within and outside of the courts;

c) the role of Small Claims Courts in providing effective access to the system, and the jurisdiction and structure of such courts; and,

d) certain aspects of alternative dispute resolution (ADR).

In addressing these and other issues, the Fundamental Issues Group held a consultation symposium in November 1994 and participated in a number of community meetings. In addition, the following research papers were commissioned:

Sandra Wain, *Public Perceptions of the Civil Justice System*

John Twohig, *Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto 1973-1994*

Larry Fox, *Administrative Agencies Empirical Study*

R. Howse and M. Trebilcock, *The Role of the Civil Justice System and the Choice of Governing Instrument*

Lorraine Weinrib, *The Role of the Courts in the Resolution of Civil Disputes*

Martha Jackman, *The Reallocation of Disputes from Courts to Administrative Agencies*

Kent Roach, *Fundamental Reforms to Civil Litigation*

Allan Stitt, Francis Handy and Peter A. Simms, *Alternative Dispute Resolution and the Ontario Civil Justice System*

Iain Ramsay, *Small Claims Court: A Review*

Margot Priest, *Fundamental Reforms to the Ontario Administrative Justice System*

Ian Morrison and Janet Mosher, *Barriers to Access to Civil Justice for Disadvantaged Groups*

The information contained in the research papers, and the input derived from the Fundamental Issues Group under the able guidance of John McCamus, have been very helpful in informing our deliberations. We wish to acknowledge, with appreciation, the contributions these authors and the Fundamental Issues Group have made to the Civil Justice Review. The research papers will be published separately, in conjunction with the Ontario Law Reform Commission, in the form of Research Studies presented to the Fundamental Issues Group.

1.4 CHANGES AFFECTING THE CIVIL JUSTICE REVIEW SINCE THE FIRST REPORT

Since the release of our *First Report*, the province of Ontario has undergone a change in government, a new Chief Justice of the Ontario Court of Justice has been appointed, and the former Chief Justice of that Court has become the Chief Justice of Ontario. In concluding this Chapter on "How We Got to Where We Are", it must be said that this stage could not have been attained were it not for the positive response and support received from Chief Justices McMurtry and LeSage and former Attorney General Marion Boyd and current Attorney General Charles Harnick, as well as from members of the Bar, the Administration and the Judiciary generally. Without this dedicated support -- which, with the ongoing input of our

public representatives, continues to reflect the four-participant approach to resolving justice problems that has characterized the Civil Justice Review process -- the momentum for civil justice reform in this province might well have been blunted. So, too, would the considerable progress which has been made towards implementation of our initial recommendations, about which we will speak in Part II, have been impossible.

Certain changes in the Civil Justice Review itself need to be noted as well. Perhaps the most significant change resulted from the need to find a new co-chair following the promotion of Sandra Lang from her position as Assistant Deputy Attorney General, Courts Administration Division, to Deputy Minister, Ministry of Community and Social Services. She was replaced temporarily by Marc Rosenberg, then the Assistant Deputy Attorney General, Public Law and Policy Division, until his appointment to the Court of Appeal for the Province of Ontario. On February 8, 1996, Heather Cooper, the new Assistant Deputy Attorney General, Courts Administration Division, was named as Co-chair of the Review. She has and continues to make a significant contribution to this process. Staff at the Review has also changed. Ann Merritt, formerly the Executive Coordinator of Strategic Planning, Ministry of the Attorney General, has been appointed as Project Director, and Lillian Nazareth is now serving as the Project Administrator.

CHAPTER 2

THE PROCESS OF THE CIVIL JUSTICE REVIEW SINCE THE *FIRST REPORT*

FURTHER CONSULTATION AND DIALOGUE

"Geneva II" - Collingwood, Ontario

The process of consultation, which was so much a part of our *First Report,* has continued. On April 30th to May 2nd, 1995, a conference was held in Collingwood so that judges, lawyers, court administrators and members of the public could meet to discuss the *First Report* and to formulate plans for implementing the Report's recommendations. The conference was attended by about 85 representatives from these four groups.

A number of workshops were held focusing on "Implementing the Vision", and including sessions covering such matters as "Delay and Backlog", "Technology: Possibilities, Opportunities and Pitfalls", and "The Team Concept: Making it Work". Also included on the agenda were two technology demonstrations -- one demonstrating electronic filing, and the other a motion by video conferencing. The conference was a success and provided another opportunity to further the lines of communication between the participating groups in the justice system.

Throughout the conference, Task Force members were asked to share their views on the problems facing the civil justice system which had led them to make the recommendations in the *First Report*. In addition, the Task Force invited participants at the conference to offer feedback both on the Review itself and on the recommendations. A 30-minute video of these conversations was prepared, which was distributed to 45 cable stations across the province.

The Review produced the video both to educate and to inform the public. In our view, the public needs to acquire -- and from our consultations appears to want to acquire -- an understanding of the civil justice system. This understanding is an important ingredient in developing public support for an agenda of change.

An informal survey of the 45 television stations has revealed a favourable response to

the video. While most of the stations contacted have aired the video at least once, a large number have aired it more than three times.

Visit from The Right Honourable the Lord Woolf

In June 1995, The Right Honourable the Lord Woolf of England released his Interim Report[1] and in July 1996, his Final Report entitled "Access to Justice".[2] Lord Woolf's Report deals with the problems facing the civil justice system in England and Wales, many of which are very similar to those addressed by the Civil Justice Review. In September 1995, Lord Woolf visited Toronto.

What is remarkable about the Woolf Inquiry and the Civil Justice Review is that these two separate bodies from two different jurisdictions independently arrived at very similar conclusions. As stated by Lord Woolf:[3]

> I am comforted by the fact that so many of the proposals [in the *First Report*] anticipated my own proposals. It recognizes that we have to look again at our traditional approach to dispute resolution and our institutions and, while retaining their strengths, modify those features where to do so, will overcome the present shortcomings. It recognizes, as I do, that we have to look again at our court structures, at our procedures, our professional practices and the priority we give to civil justice.

Like the Civil Justice Review in Ontario, Lord Woolf concludes that:[4]

> [The] present system ... is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of

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[1] The Right Honourable the Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales* (June, 1995).

[2] The Right Honourable the Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (July, 1996) [hereinafter "*Access to Justice*"].

[3] The Right Honourable the Lord Woolf, Address (Dinner in Honour of Lord Woolf, Osgoode Hall, September 6, 1995) [unpublished]. Lord Woolf has since been appointed the Master of the Rolls in England.

[4] *Access to Justice*, *supra*, note 2, at p.2.

> equality between the powerful, wealthy litigant and the under-resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no-one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.

The Woolf Report concludes that these problems make the system in the United Kingdom increasingly inaccessible. Some of the specific recommendations made in *Access to Justice* to address those problems are:

- procedures should be tailored to meet the needs of the individual case;
- for cases between £3,000 and £10,000 the type of procedures available should be limited;
- for cases above £10,000, a new multi-track system should be created, providing for "hands-on" management by teams of judges;
- within the multi-track system there should be consideration of cases at two stages -- a case management conference, early in the case and a pre-trial review, shortly before trial; and
- technology should be implemented, including video and telephone conference facilities.

During his visit, Lord Woolf toured the Alternative Dispute Resolution (ADR) Centre, and also met with case management groups and judicial team leaders.

The Canadian Bar Association Systems of Civil Justice Task Force

Coinciding with the release of our *First Report*, the Systems of Civil Justice Task Force was formed by the Canadian Bar Association (CBA) to inquire into the state of civil justice on a national basis and to develop mechanisms to help modernize the civil justice system. The Task Force consulted individuals and organizations across Canada with an interest in civil justice reform, including the Civil Justice Review, and on August 25, 1996, released its

Report.[5]

Like the Civil Justice Review in Ontario, the CBA Task Force stressed the importance of an accessible and efficient civil justice system and noted its current shortcomings:

> [C]ivil law is part of all of our lives. It follows that a fair, effective and accessible civil justice system is essential to the peaceful ordering and the economic and social well-being of our society. Yet the Task Force discovered that many Canadians feel that they cannot exercise their rights effectively because using the civil justice system takes too long, is too expensive, or is too difficult to understand.

Many of the recommended approaches proposed by the CBA Task Force to address these problems are similar to those found in our *First Report*, including, for example, the need for the courts to become dispute resolution centres, referred to in the CBA Report as a "multi-option" civil justice system, and for the judiciary to assume a greater supervisory role over the progress of cases.[6] Indeed, the vision for the civil justice system articulated in the Report[7] has many of the same elements as our framework for the modern civil justice system set out earlier in Chapter 1.[8]

Other Meetings

Since the release of our *First Report*, the Civil Justice Review has continued its consultative process in an effort to promote its vision and to respond to any concerns. The Task Force has met with members of the judiciary, the bar and courts administration across the province, and has also accepted invitations to meet with interested groups.

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[5] *Systems of Civil Justice Task Force Report* (The Canadian Bar Association, August 1996).

[6] *Id.*, at pp. 31 - 50.

[7] *Id.*, at p.23.

[8] See *supra*, Chapter 1, at p.5.

CHAPTER 3

RESPONSE TO THE FIRST REPORT

> I believe that the Report of the Civil Justice Review Team is a very important and historical landmark in the evolution of our civil justice system....
>
> The Civil Justice Review Report is a most impressive beginning and represents nothing less than a blueprint for the development of a civil justice system for the next century.[1]
>
> Chief Justice R. Roy McMurtry

> [T]his government will not cast aside this Report while the more challenging and long term goals are being developed....
>
> I am confident that its recommendations outline a model for a faster, fairer, and more efficient civil justice system for the province.[2]
>
> Attorney General Charles Harnick

3.1 GENERALLY

The response to the Civil Justice Review and its *First Report* has been favourable. While questions have been raised about particular aspects of the vision, on the whole, the recommendations have been well received by the participants in the civil justice system.

The questions we have been asked most often during our second consultation phase have been "when will we see this happen?" and "is there the political will to implement the recommendations and a commitment to provide the necessary funding and resources?". Both

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[1] The Honourable R. Roy McMurtry, former Chief Justice of the Ontario Court of Justice, General Division, and current Chief Justice of Ontario, Address (Ontario Court of Justice (General Division), Spring Seminar, Toronto, Ontario, May 5, 1995) [unpublished].

[2] Charles Harnick, Attorney General, Address (Dinner in Honour of Lord Woolf, Osgoode Hall, September 6, 1995) [unpublished].

the Chief Justice and the Attorney General have publicly stated that they support the Civil Justice Review and are committed to implementing its recommendations. Chief Justice LeSage has said:[3]

> The pressures on the civil justice system in Ontario are continuing to mount. There is an urgent need to proceed with rapid implementation of the recommendations of the Civil Justice Review. The *status quo* is no longer an option.

That support is further reflected in a letter forwarded to the Co-Chairs by the Deputy Attorney General in which he states:[4]

> First, we want to tell [the Civil Justice Review] that in a Ministry with far too many absolutely essential responsibilities, implementing the Civil Justice Review is a key priority. It has our Minister's commitment and that of the whole senior management team. This commitment is firm and will not waiver.

We have also heard scepticism on the part of Courts Administration as to whether members of the judiciary and the bar are prepared to make the necessary adjustments in order to make the proposed system work. As we point out later in this Chapter, we believe they have demonstrated their willingness to do so.

Even with the commitment of both the Chief Justice and the Attorney General, however, continuing emphasis on the need for a co-ordinated and collaborative approach to implementation of our recommendations is necessary. This need was highlighted by the Deputy Attorney General at the Cranberry Conference, when he said:[5]

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[3] The Honourable Patrick J. LeSage, Chief Justice of the Ontario Court of Justice, General Division, Address (Council of Regional Senior Justices, September 9, 1996) [unpublished].

[4] Letter from Larry Taman, Deputy Attorney General to the Honourable Mr. Justice Robert A. Blair (October 25, 1995).

[5] Larry Taman, Deputy Attorney General, Address (Cranberry Conference, Collingwood, Ontario, May 1, 1995) [unpublished].

> One of the key facts we need to deal with is that it will be easy to move government and make the investment if we can come forth with a powerful and cohesive voice and it will be difficult if we do not. It is a fact of political life that these are issues where we will make progress only if there is cohesion.

We need to put aside those areas where we may have differences and present a united front committed to change. We believe the justice system participants are now doing this.

3.2 FROM THE PUBLIC

Overall, the feedback we received from the public is that both the work of the Review and the recommendations made in the *First Report* address many of their concerns. Further, the public's response has been one of relief at finally being listened to.

The composition of the Review, along with its consultative process, has been based on the belief that the public dimension of the system cannot be forgotten, and must receive attention in the future. This participatory role must continue to be fostered and included as part of any future reform process.

One important way of ensuring that the public is part of this process is to keep them informed. We believe that accessible information about the civil justice system needs to be made available to the public, in order to combat the lack of understanding the public has about the law and its procedures. Without the public's understanding of the system and the problems that exist, it will be difficult to obtain their support for any agenda of change.

3.3 FROM THE BENCH

The response from the bench, as represented by the Chief Justice of the Ontario Court of Justice, has been one of consistent support. For instance, in his response to the *First Report*, the then Chief Justice said:[6]

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[6] The Honourable R. Roy McMurtry, former Chief Justice of the Ontario Court of Justice, General Division, and current Chief Justice of Ontario, Address (Cranberry Conference, Collingwood, Ontario, May 1, 1995) [unpublished].

> It is essential that plans for implementation be carried out quickly in order to take advantage of and build momentum generated by the Civil Justice Review. I fully endorse the recommendations contained in the Report and I am pledging the commitment of our court.

His successor, Chief Justice LeSage, has said:[7]

> The commitment of our court to the recommendations of the Civil Justice Review remains strong. It is imperative that implementation of the recommendations proceed as expeditiously as possible. Delay will further erode public confidence in the justice system.

The response from the rest of the bench has, in general, been positive.

Questions have been raised about some particular aspects of case management. Some are worried that it imposes "extra-duty" on judges who have difficulty enough coping with the demands on their time. This concern has arisen, in part, because when case management was initially introduced in the Toronto civil project, the judges were expected to carry out their case management functions in addition to their regular judicial duties either before or after their regular court sittings. This proved unworkable.

The members of the Review believe that this concern has been addressed by the proposal for creating case management teams to be responsible for the processing of cases in the caseflow management system. The case management teams will consist of not only judges but also the necessary administrative support in the form of Case Management Co-ordinators, and the necessary case management and adjudicative support in the form of Case Management Masters. When a case is assigned, it will not be assigned to an individual case management judge but to a "case management team". We believe this team concept will relieve the judges of the clerical and administrative aspects of case management and from some of the interlocutory motion work they carry.

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[7] The Honourable Patrick J. LeSage, Chief Justice of the Ontario Court of Justice, General Division, Address (Council of Regional Senior Justices, May 23, 1996) [unpublished].

Other questions we heard focused on the "team concept" itself and on "inter-regional circuiting" and "individual calendaring". There has been uncertainty as to what these recommendations would mean for a particular Region and locality. We note, however, that the proposed "team concept" is compatible with the already existing organization of judges in regions with mini-circuits.

One area we did not deal with at length in our *First Report*, and which was raised during our second consultation phase, was the Court of Appeal. The backlogs there are significant and we heard many complaints about the delay and costs involved in appeal proceedings. Some of these concerns are already being addressed. For example, a Backlog Committee has been created chaired by The Honourable Mr. Justice Coulter A. Osborne.

3.4 FROM THE GOVERNMENT

At the conference in Collingwood, the former Attorney General Marion Boyd stated that:[8]

> Many in the Legislature have expressed concern about the delays. That access is a concern among all political parties. That you [the Civil Justice Review] will likely find the same commitment no matter what party is in government.

We are pleased to report that this view has been borne out. The new Attorney General Charles Harnick has stated that: "this government will not cast aside this Report while the more challenging and long term goals are being developed." Mr. Harnick went on to add that short-term measures outlined in the Report can and should be implemented now, while longer-range plans for proposed technological improvements are being developed. In particular, he said:[9]

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[8] Marion Boyd, former Attorney General, Address (Cranberry Conference, Collingwood, Ontario, May 1, 1995) [unpublished].

[9] Charles Harnick, Attorney General, Address (Dinner in Honour of Lord Woolf, Osgoode Hall, September 6, 1995) [unpublished].

> As part of a long term solution, the report includes a series of recommendations related to technology that will require significant investment. The report also identifies short term measures addressing the current backlog crisis as well as a case management model. These measures can and should be implemented while the committee develops a business plan for the capital investment required to phase in the necessary technology.

The recommendations of the *First Report* have also received support from the federal government. After the release of the *First Report,* the Civil Justice Review received a letter from the Deputy Minister of Justice offering his government's assistance with any further consultation or study and, in particular, with respect to the proposed single issue task force for a unified administration, management and budgetary structure. The federal government also expressed an interest in jointly exploring both alternative dispute resolution mechanisms and civil justice technology innovations.

3.5 FROM COURTS ADMINISTRATION STAFF

When we consulted with members of courts administration, we heard that front-line staff were very pleased to see so many of their suggestions incorporated in the *First Report*. There was a sense of relief here too, that someone was acknowledging their experience and concerns. We were also told that staff believe that something will be done as a result of the Review and are willing to participate in the process. The Task Force would like to acknowledge the significant contribution front-line staff have made to the review process and to the development of a shared responsibility for the system.

3.6 FROM THE BAR

The Civil Justice Review has received written responses from the Civil Litigation Section, the Construction Law Section and the Family Law Section of the Canadian Bar Association - Ontario, as well as from the Advocates' Society, the Carleton County Law Association, Association Des Juristes D'Expression Française De L'Ontario, and individual lawyers. Generally, these responses have been supportive of the Report's recommendations

and vision. As stated in one such response:[10]

> We believe that your report has perceptively analyzed many of the problems facing civil litigants in this province and that many of the solutions proposed by your team are sensible, achievable and deserving of our support.

Similarly, another response noted that:[11]

> The report reflects a massive effort of consultation and synthesis. The Civil Justice Review Committee has identified the significant problems with Ontario's system of civil justice. In many cases the Civil Justice Review Committee has analyzed and proposed concrete solutions to these problems.

The Bar has also expressed concern with some of the Task Force's proposals. The concern raised most often stemmed from the Review's support of the Simplified Rules Subcommittee proposal to eliminate examinations for discovery in cases below $40,000. However, during our consultations, we repeatedly heard that the public cannot afford to litigate cases under $40,000 and, in our view, this raised important access to justice issues which must be addressed. Notwithstanding the concerns expressed by the Bar, the Simplified Rules Committee proposal has been adopted, albeit for cases under $25,000. In addition, a mechanism has also been adopted to evaluate how effective the simplified rules are in addressing the problem of unaffordable litigation. Finally, we note that other jurisdictions have also recommended restricted procedures including limited discovery for cases under a prescribed monetary value.[12]

The Bar also suggested that we should have made specific recommendations about the

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[10] Letter from Clifford Lax, Q.C., President of the Advocates' Society to the Honourable Mr. Justice Robert A. Blair (September 18, 1995).

[11] Canadian Bar Association - Ontario, *Civil Litigation Section News*, Special Edition (April 1995), at p.5.

[12] See, for example, The Right Honourable the Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (July, 1996).

uniform administrative, management and budgetary structure for the court system, instead of proposing that a single issue Task Force be established for this purpose. The Bar is of the view that this issue does not require any further study and should be acted upon.

The Civil Justice Review agrees. However, in recommending that a unified structure for courts administration is necessary, we recognized in our *First Report* that the need for such a structure "applies across the justice system in the Province as a whole -- to a structure for both civil and criminal matters".[13] As our mandate is limited to civil justice reform, we are not in a position to recommend a specific structure. It is important that all participants in the broader justice system take part in developing this structure, including the Ontario Court of Appeal, the Ontario Court of Justice (Provincial Division) and the criminal justice system.

Aside from these comments, it is apparent that members of the Bar support the overall objective of the recommendations contained in the *First Report*. There is a willingness among the Bar to commit to taking part in an agenda for change. As stated by Clifford Lax, (then) President of the Advocates' Society:[14]

> We applaud the comprehensive nature of your report and the thoroughness of your conclusions. We trust that our comments or reservations are not in any way interpreted as a lack of support for the thrust of your report. Changes are needed and the Advocates' Society will be pleased to play whatever role and provide whatever assistance to ensure that the justice system is made more efficient and less costly while retaining at least the current levels of quality and fairness.

We believe that this is true of the Bar in general.

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[13] *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995), at p.121.

[14] *Supra*, note 10.

Part II

STATUS OF IMPLEMENTATION

CHAPTER 4

IMPLEMENTATION PLAN, STRUCTURE AND WORKING GROUPS

4.1 THE PLAN

Implementation

Implementation was, and remains, the imperative foremost in the minds of the Civil Justice Review team after the release of our *First Report.*[1] We recognized that in order to translate the Report's recommendations into concrete results it was important to map out a process for implementation and to act as a catalyst in moving that process forward. Thus, in our transmittal letter to the Chief Justice and the Attorney General we urged that the implementation process begin immediately, and stated that:[2]

> In our view, it will not be necessary to await the results of our Final Report before initiating action. The task ahead of us is enormous. We need to get on with the plan for implementation while the window of change remains open.

With that in mind, we set out in Chapter 23 of the *First Report* some preliminary thoughts with regard to the implementation process and issues.

Support for early implementation was quickly forthcoming from the Offices of the Chief Justice and the Attorney General. As early as the second Civil Justice Review conference at Cranberry Village in May, 1995, they bolstered the implementation concept with these assurances:

Chief Justice R. Roy McMurtry:[3]

> It is essential that plans for implementation be carried out quickly in order to take advantage of and build on the momentum generated by the Civil Justice Review.

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[1] *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995) [hereinafter "*First Report*"].

[2] *Id.*, at pp. 1 - 2.

[3] R. Roy McMurtry, former Chief Justice of the Ontario Court of Justice, General Division, and current Chief Justice of Ontario, Address (Cranberry Conference, Collingwood, Ontario, May 1, 1995) [unpublished].

(Then) Attorney General Marion Boyd:[4]

> I hope everyone here today will support the contract for change and lead the change process. As we build on the momentum begun by the Civil Justice Review, we must be prepared to challenge those who try to prevent change by appealing to tradition or to standard practices of the past.

The newly appointed Chief Justice of the Ontario Court of Justice (General Division), the Honourable Patrick Lesage, has continued the support of his predecessor in this regard.[5]

> The commitment of our court to the recommendations of the Civil Justice Review remains strong. It is imperative that implementation of the recommendations proceed as expeditiously as possible. Delay will further erode public confidence in the justice system.

At the same time, the new Attorney General, the Honourable Charles Harnick, was also quick to endorse the need for action:[6]

> I believe that in light of the challenges currently facing the administration of the courts in Ontario, the collaboration and cooperation among the Bench, the Ministry of the Attorney General, the Bar and the Public enabled our committee to develop a viable plan, and one that is capable of taking our courts into the next century.

At the present time, implementation initiatives have focused on the recommendations in the *First Report* specifically relating to:

- province-wide caseflow management;
- the technology necessary to sustain the recommendations;

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[4] Marion Boyd, former Attorney General, Address (Cranberry Conference, Collingwood, Ontario, May 1, 1995) [unpublished].

[5] The Honourable Patrick J. LeSage, Chief Justice of the Ontario Court of Justice, General Division, Address (Council of Regional Senior Justices, May 23, 1996) [unpublished].

[6] Charles Harnick, Attorney General, Address (Dinner in Honour of Lord Woolf, Osgoode Hall, September 6, 1995) [unpublished].

- a new process for family law matters; and
- backlog.

4.2 THE STRUCTURE AND WORKING GROUPS

Implementation is proceeding with the joint support of the Chief Justice and the Attorney General. The Task Force continues to provide general guidance and it is intended that the Civil Justice Review, for the time being at least, will remain a collaborative vehicle whereby the Ministry, the Judiciary, the Bar and the Public together will develop ways to implement its recommendations and find the resources to do so. We have been assisted in that regard by a dedicated project team consisting of a Project Director, Ann Merritt, and a small support staff.

As envisaged in the *First Report*, four Working Groups were established to develop implementation plans relating to "caseflow management processes", "technology", "family law", and "backlog". The members of the Working Groups are listed in Appendix 4. Incorporated into the responsibilities of each of these Working Groups was a "rules" proposing function. As discussed later in this Chapter, it has not been necessary for the backlog Working Group to become active because of the great success of the backlog initiatives undertaken in the Regions at the instance of the Chief Justice, the Regional Senior Justices, the Bar and Courts Administration. The Case Management and Family Law Working Groups have been very active, however.

4.3 CASE MANAGEMENT

Co-chaired by Madam Justice Gladys Pardu[7] and by Ms. Mary Lou Benotto[8], the Case

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[7] Madam Justice G. Pardu is assigned to Sault Ste. Marie, Ontario, and has been responsible for the case management pilot project in that area, one of three in the province where case management has been successfully modelled.

[8] Madam Justice M. L. Benotto was appointed to the Ontario Court of Justice (General Division) in May, 1996. Prior to her appointment, and while an active member of the Bar, she was Vice-chair of the Joint Committee on Court Reform with particular involvement in case management initiatives.

Management Working Group is responsible for developing the form of caseflow management system to be introduced across the province and for overseeing its implementation on a province-wide basis.

A Final Report and a set of proposed province-wide Case Management Rules have been prepared by the Working Group, which the Civil Justice Review endorses in principle. The Report is discussed in Chapter 5.1 and the full text of the proposed Rules included as Appendix 2.

It is anticipated that, based on these proposed Rules, case management will be expanded to Ottawa for 100% of civil cases and from 10% to 25% in Toronto early in 1997.

4.4 LEGISLATION

Also in keeping with the Civil Justice Review's case management recommendations and the proposed "team" approach to the processing of cases, amendments to the *Courts of Justice Act* were introduced recently to create the position of Case Management Master (called a "Judicial Support Officer" in the *First Report*[9]). The *Courts Improvement Act*, (Bill 79) received Third Reading on October 29, 1996.

4.5 TECHNOLOGY

For the purpose of devising specific implementation proposals relating to an appropriate technological infrastructure for the civil justice system, we thought it necessary to call upon the expertise of individuals from all constituencies within the system -- including the technology community. Much co-ordination and careful planning was called for and, accordingly, we recommended the creation of a Technology Working Group.

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[9] *First Report*, *supra*, note 1, at p.182.

The broad mandate of the Technology Working Group, as proposed in the *First Report*,[10] is to develop specific proposals for the implementation of technology solutions for the civil justice system. The proposed Terms of Reference focused on determining optimum solutions for developing the technology foundation necessary for Ontario's civil justice system, having regard to:

- cost effectiveness;
- support of caseflow management;
- the need for a new management information system;
- appropriate training opportunities and facilities for users of the system;
- enhanced public access to the system;
- secured integrity of the court record;
- compliance with the unique needs of the judiciary;
- viability into the 21st century; and
- integration of data and processing of information from all parts of the justice system -- bar, bench, ministry, police, corrections and others -- while ensuring the principles of an independent judiciary.

Our view of the importance of meeting these criteria in designing and implementing a technology infrastructure has not changed, and we reiterate them here for that reason.

Civil Justice Technology Advisory Committee

In conjunction with technology implementation, a Civil Justice Technology Advisory Committee has been struck. It is co-chaired by Madam Justice Bonnie Wein of the Ontario Court of Justice (General Division) and by Angela Longo, Assistant Deputy Attorney General, Business Improvement Division. Its members are drawn from the Bench, Bar, Ministry and the Public. They include the systems manager from a large law firm, a senior representative

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[10] *Id.*, at pp. 362 - 363.

from Interac, a bank vice-president, a public member of one of the Regional Courts Management Advisory Committees and knowledgeable technology delegates from the Ministry.

The mandate of the Advisory Committee is to provide advice and guidance to the Civil Justice Review and to the Senior Management Committee of the Ministry of the Attorney General regarding the implementation of both short and long term information technology initiatives for the civil justice system. These initiatives are summarized as follows:

(i) **INTERIM "1996/97 INITIATIVES"**

- by early 1997, Case Management is to be expanded to 25% in Toronto and introduced on a 100% basis in Ottawa, using the SUSTAIN for Windows software;

- an Electronic Filing Pilot Project involving a limited number of participants in Toronto is also to be launched in early 1997;

- a software program known as the *Computer Assisted Case Tracking and Information System* (CACTIS) is to be put in place to automate and standardize all General Division trial coordination offices with respect to case information retrieval, case scheduling, case tracking and statistical retrieval; and

- a Business Process Re-engineering initiative is being conducted in all court offices with a view to identifying the most streamlined and efficient operational practices for those offices, in order to ensure that automation is carried out in the most effective manner.

(ii) **LONGER TERM INITIATIVES: PARTNERING WITH THE PRIVATE SECTOR**

- a Common Purpose Procurement Process ("CPP") has been issued in order to select a private sector partner that will work closely with government and the courts to identify, develop and implement longer term technology solutions for the justice system.

A full time project manager has been recruited to support the implementation of technology initiatives. To initiate the deliberations of the Civil Justice Technology Advisory Committee, a well-attended Technology Conference was held on May 30th, 1996. Among the

items discussed at the Conference were:

- current and planned technology initiatives and infrastructure for the civil court system, including the importance of business process re-engineering as a precursor to technology implementation; and

- the experience of others in partnering technology initiatives with the private sector.

Video Conferencing

With regard to video technology, pilot projects have been established in North Bay, Ottawa, London and Sudbury. While these pilot projects were initially set up in cooperation with the Ministry of Solicitor General and Corrections and focused on criminal remands, the equipment has also been used to test the technology in civil matters. In Ottawa, for example, video technology has been successfully utilized in a number of innovative ways. In several civil matters, including a civil jury trial, witnesses have been examined and cross-examined by video with positive results -- and in the process, saving substantial travel costs to the parties and allowing scheduled trials to proceed as planned. The potential benefits of this form of technology are only now being realized.

4.6 FAMILY LAW

A "focus on family law" was the subject of a separate Chapter in the *First Report*,[11] and in response to the call for implementation a Family Law Working Group has been established.

Family Law Working Group

This Working Group is chaired by Regional Senior Justice B.T. Granger, assisted by Ms. Debra Paulseth,[12] the Regional Director for Toronto Region. It is responsible for developing and implementing the Civil Justice Review's proposals for a "resolution-focused"

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[11] *Id.*, c.16.

[12] Ms. Paulseth was formerly Counsel to the Civil Justice Review during its *First Report* phase.

process for family law in Ontario.

The Working Group is composed of 15 members: two are General Division Justices; one is a Family Division Justice; two are Provincial Division Judges; six are members of the bar (three from outside Toronto); one is a public representative; another a law professor; and three are Ministry representatives. The full group has met on three occasions for two days and at least one further meeting is planned. The progress of the Working Group is discussed in Chapter 7 where family law issues are discussed at greater length.

4.7 BACKLOG

Elimination of the civil backlog has been recognized as a prerequisite to the introduction and integration of caseflow management. This imperative was emphasized in the *First Report*.[13]

With this in mind, backlog reduction plans were prepared for each Region by the Regional Senior Justice, at the instance of the Chief Justice and in conjunction with administrative personnel. The plans entail the movement of designated "backlog" judges between Regions, whereby seven judges in each Region are assigned for a four week period to backlog teams in order to attack the existing backlog in that Region. This initiative has been underway since March of this year, building upon earlier preparatory efforts.

The results have been very encouraging.

In the East Region -- Ottawa, in particular -- backlog reduction efforts began in earnest in early 1995. By mid-Summer of that year, phase one of the Ottawa reduction plan had been completed, resulting in the elimination of over 1,000 cases from the trial list. Phase two commenced in late August 1995 and, by the conclusion of the court sittings at the end of June 1996, virtually *all* cases listed for trial prior to January 1, 1995 had been heard.

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[13] *First Report, supra,* note 1, at p.155.

In Toronto, as of June 1995, 6093 civil cases remained on the list of cases ready for trial after an initial "shaking out"[14]. A series of purge courts, and a concentrated pre-trial program, reduced this number even further. By the end of May 1996, only 735 cases remained on the list.

These results have required a massive mobilization of effort, organizational skills, and good will on the part of the Regional Senior Justices and the judiciary in general, the members of the Bar who devoted enormous amounts of time and energy to the conduct of pre-trials and to readying their own cases to be dealt with, and Courts Administration personnel who spent hours of organizational time making the scheme work. In addition to the travelling teams of judges, senior members of the Bar devoted thousands of hours to pre-trial settlement meetings, so that judicial resources could be made available for trials. Trial coordination staff supported the process through innumerable calls to "shake out" trial lists and by advising lawyers of when to be ready for trial.

Throughout the Civil Justice Review's initial period of consultation, lawyers indicated their disapproval of the trial "blitz" as a means of attacking the backlog, but were prepared to make a contribution with the expectation that case management would be implemented, that trial delays would be reduced and that future backlogs would be eliminated. As a result of these efforts, and having regard to the results achieved, case management will be expanded to Ottawa for 100% of civil cases and to 25% in Toronto in early 1997, as we have mentioned previously.

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[14] "Shaking out" is a procedure to determine which cases on the list are actually waiting to be pre-tried or tried, as opposed to cases, for example, that have already been settled or discontinued: see *id.*, at p.157.

Part III

MAKING THE CIVIL JUSTICE SYSTEM WORK EFFECTIVELY

CHAPTER 5
MANAGEMENT OF CASES

CHAPTER 5.1
CASE MANAGEMENT REGIME AND RULES

Introduction

The Civil Justice Review has proposed the implementation of a civil caseflow management system on a province-wide basis.[1]

As noted in Chapter 4, a Case Management Working Group has been established to make recommendations regarding the introduction of such a system. The Working Group is co-chaired by Madam Justice Gladys Pardu and by a member of the Bar, as she then was, Ms. Mary Lou Benotto (now Madam Justice Benotto).[2] The Committee membership includes other representatives from the Bench, Bar, Ministry and the Public, including representatives from each of the case management pilot project sites. The Working Group met over a period of six months, with a view to proposing a case management regime and a set of accompanying rules which would achieve the following objectives:

- earlier dispute resolution;
- reduction of legal costs;
- elimination of delays and backlog;
- efficient allocation of judicial, quasi-judicial and administrative resources;
- protection of the parties by ensuring that the individual litigant receives information about the time limits provided in the rules;
- easier access to the most appropriate method of resolving a particular dispute.

The Working Group presented its Report to the Task Force in June 1996. We are indebted to the co-chairs and to its members for their considerable efforts and for the

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[1] See *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995), at pp. 183 - 184 [hereinafter "*First Report*"].

[2] Ms. Benotto was appointed to the Ontario Court of Justice (General Division) in May, 1996.

contribution they have made to the ongoing development of caseflow management in this Province. Mr. Justice Jack Ground is deserving of some individual acknowledgement for his contribution in spearheading the drafting of the rules included in the Report.

The Civil Justice Review accepts and adopts the Working Group's Report and the draft civil case management rules put forward for province-wide implementation, in principle. A full text copy of those proposed civil case management rules is found at Appendix 2 to this *Supplemental and Final Report*.

There is one minor exception to our adoption of these proposed rules in their entirety. The exception pertains to the mechanism for matching mediation appointments to cases in ADR situations. Our different perspective, and recommendation in this respect, will become apparent in the overview which follows.[3]

Overview

The Civil Justice Review has given careful further consideration to the concept of case management since the publication of our *First Report*, to the consultation feedback which we have received on the subject, and to the report of the Case Management Working Group. Our *Supplemental and Final Report* recommendations are based upon these deliberations and upon the proposals put forward by the Working Group. The essential features of the case management regime that we recommend be introduced across Ontario, and of the rules which would give it shape, together with the technology requirements necessary to bolster and facilitate the successful implementation of that regime, are these:

a. Case Management Teams

The principal responsibility for the management of proceedings through the system will reside ultimately with the judiciary rather than with the Bar, as has traditionally been the case.

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[3] With the reservations noted, the source of much of what follows is to be found in the Working Group's Report.

However, in order to allocate functions such as early screening of cases into appropriate streams, case management teams consisting of judges, judicial support officers (now to be called Case Management Masters) and a case management co-ordinator are to be established. This concept is more fully put forward and explained in our *First Report.*[4]

A successful case management regime depends upon the appointment of an adequate number of Case Management Masters to support the work of the case management teams. It is fundamental to success that an analysis of each contested case be possible so that each matter can be resolved in the most appropriate way. It is expected that the Case Management Master will do this sorting and screening at an early case conference; indeed, one of his or her key functions will be to perform the early evaluation, screening and streaming of cases. Where mandatory ADR is in place, the evaluation, screening and streaming process will generally occur after a defence has been filed and the initial ADR session has been held (and the matter has not been resolved).

In addition, the Case Management Master will:

-- preside over case conferences

-- hear procedural motions

-- preside over or assist with settlement conferences and trial management conferences where appropriate and under the supervision of the Case Management Judge

-- manage construction lien matters

It is anticipated that a case management co-ordinator would be appointed in each Court to be responsible for day to day administration of case management, including -- subject to judicial supervision -- scheduling.

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[4] *First Report*, *supra*, note 1, at pp. 187 - 196.

b. A Single Set of Rules

There should be one set of case management rules that would apply to all civil (non-family) actions and applications commenced in the Ontario Court of Justice (General Division).

c. Court Monitoring Only After Defence

While every proceeding started should be counted by the Court to ensure its control over inventory, only defended cases should be administered. These goals can be achieved by:

(i) monitoring the time by which a settlement conference (formerly called a "pre-trial") must be arranged; and,

(ii) providing that cases not advanced or resolved within a fixed period of time be automatically dismissed.

In this fashion, the time, energy, and cost expended by the Court in administering cases should be reduced significantly.

d. "Tracks"

The proposed system calls for only two "tracks" of cases: a "standard" track, and a "fast" track. Some case management systems call for a third, or "complex" track of cases. It is felt, however, that those cases which, for whatever reasons, require more intensive case management attention and a tailor-made timetable can obtain that flexibility through the case management mechanisms of the standard track, however.

e. The Streamlining of Time Guidelines

An important lesson learned from the three caseflow management pilot projects was that the rules providing for detailed time limits were cumbersome, and that they led to too much administration and to too many motions to extend time at the judicial level. Accordingly, the province-wide rules presently being proposed will provide principally for only two mandated time limits. Those time limits relate to the period within which an ADR session is to be held following the filing of a response, and the time within which a case is to be ready for a settlement conference.

The draft case management rules found at Appendix 2 of this *Supplemental and Final Report*, and proposed by the Case Management Working Group, call for the following time limits:

(i) that where ADR is available in the region, the parties must attend for ADR within 60 days from the date the first response is filed, and;

(ii) that the case must be ready for a settlement conference 90 days after the filing of a defence for the fast track cases and after 240 days for standard track cases.

These time parameters are *slightly* more ambitious than the 9 to 12 months from initial filing which we recommended in our *First Report*. The system as we envision it, however, will be free of backlog, will be properly managed and resourced, and will be supported by the necessary technology infrastructure to permit it to work effectively. Much tighter time guidelines than those which are presently in vogue are readily attainable in such an environment, and we applaud and encourage any reasonable time mandate upon which the Bar and the Bench can agree for the more expeditious handling of the public's cases.

A further characteristic of the case management regime which we propose is that cases will be expected to be at trial within two months of the settlement conference being held. This means that standard track cases should be at trial within approximately 10 months of the exchange of claim and defence, and fast track cases within 5 months of that time. Obviously exceptions to these timeframes will occur in more complicated cases, or in other cases which may require longer to "mature", but such extensions will only happen with the concurrence of a Judge or Case Management Master.

In our *First Report* we established an objective of having cases determined at trial within a framework of 1½ to 2 years from start to finish. The efforts of the broadly representative Case Management Working Group, our further consultations, and additional support from other sources such as the recent report of the Canadian Bar Association Systems

of Justice Task Force[5] have shown us that there is a will among the participants in the system to work towards even more ambitious objectives. We believe that the streamlined time guidelines proposed here, together with adherence to other time parameters relating to the processing of cases, will make those objectives achievable.

f. Integration of ADR and Mandatory Referral

It is fundamental to the civil justice system, and to the newly proposed case management system, that the public be given the opportunity to explore the most appropriate method of dispute resolution for their particular dispute. In the ensuing Chapter of this *Supplemental and Final Report*, the Review recommends the implementation of mandatory mediation for all non-family law cases, after the filing of the first statement of defence.[6]

For this recommendation to be effective, of course, it is essential that there be available an adequate supply of qualified and approved ADR providers, and that ADR services be available within the timeframes set out in the proposed rules (60 days after the first defence or responding document). This latter point is important, in order that ADR not become another vehicle for delay in the system.

Case management *can* operate independently of mandatory ADR, however, although it is clearly preferable that ADR be integrated into the case management system as it expands across the province, where possible. In some regions of the Province it may be necessary that case management operate independently, at least in the short term, while an adequate body of

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[5] *Systems of Civil Justice Task Force Report* (The Canadian Bar Association, August 1996), at p. 39. The recommendation there is that 90% of all general civil cases should be settled, tried or otherwise concluded within 6 months of filing of readiness and within 12 months of the date of the case filing; 98% within 9 months of filing of readiness and within 18 months of such filing ; and the remainder within 12 months of filing of readiness and within 24 months of the case filing; except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur.

[6] Mediation, and ADR in general, play an important role in family law disputes too. However, the issue of whether or not mediation in that context should be "mandatory" is a difficult and thorny one. ADR in the family law context is dealt with in Chapter 5.2 dealing with ADR and in Chapter 7 dealing specifically with Family Law.

qualified and approved ADR providers is built up in that region. The case management rules proposed here have been drafted to provide that mandatory ADR can be easily integrated into the existing rules as the ADR "roll out" occurs throughout the province. In the meantime, case management can, and must, proceed.

The Working Group's draft Rule 10 is the rule which anticipates the integration of ADR into the case management scheme and the mandatory referral to mediation. The Group was very concerned that referral to ADR not become an excuse for further delay on the basis that the parties were not able to find a mediator who could complete the mediation within the required 60 days. Its proposed solution to this potential problem is to provide in draft Rule 10 for the Registrar to issue a notice of appointment for mediation upon the filing of the first statement of defence and to provide for dismissal by the Registrar in the event of failure to attend or pay a cancellation fee.

The Review agrees that mandatory referral to ADR must not become a catalyst for further delay. We have concluded, however, that the logistical difficulties and the added administrative burden and attendant costs of such a mechanism, together with the draconian nature of dismissal, outweigh its advantages in blunting potential delay. It would require the computerized scheduling of the timetables of mediators on the roster of mediators and, at the same time, would require the flexibility to account for the myriad of cancellations and re-schedulings which will inevitably occur. In addition, choice of mediator is an important aspect of the acceptability of ADR among users, and the *Macfarlane Evaluation*[7] identified the lack of choice of mediator and the pre-arranged appointment as two of the features that lawyers disliked most about the court-connected ADR Pilot Project.[8]

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[7] Dr. Julie Macfarlane, *Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (November 1995). Dr. Macfarlane's evaluation covers cases referred to the Centre from January 1, 1995 to September 30, 1995.

[8] *Id.*, at pp. 31 - 35.

Consequently, while we share the Working Group's concern about potential delay, we do not agree with, nor recommend, the automatic issuance of an appointment for mediation upon the filing of a first defence. Instead, we propose in the next Chapter that mandatory referral operate through a roster of qualified and accredited private sector mediators and that the parties be entitled to choose their mediator only from that roster in the absence of leave of the court. It will be incumbent on the parties to ensure that delays are avoided and upon the Judiciary or Case Management Masters to impose cost consequences when such delays unnecessarily occur.

g. Three Types of Conferences

The proposed case management system calls for the following three types of conferences.

(i) *Case Conferences*

A Case Conference may be convened at any time by a Case Management Judge or Case Management Master on their own initiative or at a party's request, for the purpose of, for example, resolving issues, creating or amending case timetables, and considering referral to ADR.

(ii) *Settlement Conferences*

A Settlement Conference (formerly called a "pre-trial") must be held for the purpose of settling the case or issues in the case according to the following prescribed timelines: 3 months after the close of pleadings for fast track cases; and 8 months for standard track cases.

(iii) *Trial Management Conferences*

A Trial Management Conference may be convened by a Case Management Judge or Case Management Master on their own initiative or at a party's request, for the purpose of streamlining the use of trial time by, for example, exploring the most expeditious way to introduce evidence and by defining issues.

h. Timeline Sanctions

Sanctions are included for failure to comply with case management timelines, either established by the rules or by court order. They include:

- dismissal of the action
- a costs award
- striking out of any document
- a case conference being convened
- the creation or amendment of a case timetable

i. Dismissal of Proceeding

If no defence is filed, or motion brought by a party adverse in interest, and the initiating party does not move for judgment within 6 months after the proceeding has been commenced, the case will be automatically dismissed.

j. Simplified Rules Procedure

Those cases falling within the newly enacted Simplified Rules Procedure are deemed to be fast track cases. The proposed case management rules adopt rule 76.05 of the existing Rules of Civil Procedure (no discovery) for those cases.

k. Technology

Civil case management cannot work without a properly functioning technology base. An automated case management system has many hardware and software requirements, but there are many products commercially available on the market today which are capable of managing these requirements.

It is not for the Civil Justice Review to propose hardware and software *solutions* for meeting these requirements. That is a process which requires technical and other expertise which we do not possess. It is also a process which the Government has begun to address through its common purpose procurement process and the establishment of various technology initiatives within the justice sector. The Technology Advisory Committee -- referred to in Chapter 4 of this *Supplemental and Final Report* and established to assist in technology implementation for the civil justice system -- is playing a role in this regard.

It is important, however, that the *needs* for running an automated civil case management system in each of Ontario's civil courts be understood, before solutions are sought. In that respect there are some things which can be said by the Review.

(i) Hardware

The system should allow for electronic linkages between all necessary participants within a civil court office -- those in the registrar's office, the office of the case management co-ordinator or the trial co-ordinator, and the judiciary -- and, indeed, between court offices themselves.

The hardware should allow an outside source (e.g. a lawyer) to connect to the court's information system electronically. The court should have computers designated solely for such external electronic access. In addition, the hardware should allow access by someone attending the court office in person, with a number of computers in the public area being designated solely for this purpose.

The hardware must be powerful enough to handle with ease an intensive case management software, a high volume of cases and a high user-volume. It must be capable of sending information to and receiving information from counsel and other individuals by facsimile transmission, by E-mail and by other electronic media. It must have capacity for the electronic storage and scanning of documentation.

The hardware must be powerful enough to permit the internal movement, handling and management of electronic data for purposes of providing necessary management information services.

(ii) Software

Software chosen for purposes of the automated civil case management system should have the ability to carry out the following functions, or be able to connect easily with other software applications that have the ability to carry out the functions. The ensuing list is not

in any order of priority. Nor is it exhaustive.

Case Tracking	The ability to monitor the status of a case from commencement to disposition
Multi-case "type" tracking ability	The ability and flexibility to track criminal and other types of cases, as well as civil cases, to allow for potential expansion later in those directions in a co-ordinated and integrated fashion
Event Scheduling and Tracking	The ability to maintain upcoming/previous court appearances and to update the results of court appearances
Document Tracking	The ability to maintain a record of documentation filed with the court office
Cross Referencing	The capacity to link one or more cases together in order that they appear together on lists, and can be scheduled together
Multi-faceted Search and Locate Facility	The facility to search by file number, party, event date, pending/disposed status, etc.
Resource Scheduling	The ability to track the availability, or unavailability of judges, reporters, registrars, equipment, etc.
Calendaring	The process of being able to see at a glance, a calendar of scheduled activities in relation to a particular resource or group of resources
Automatic Notices, Docketing and List Production	The capacity to generate all requisite notices and court lists automatically, in a number of different formats
Tracking of Rules and Notification for Non-Adherence	The system should have the capacity to permit programming of the rules structure and of a set of consequences if rules are not adhered to
Electronic Filing	The system must be capable of receiving and sending information electronically

Image Storage and Retrieval	The capacity for electronic entry and storage of documents, and the facility to allow a user to view and, in proper cases, to print a document
Internet	The system must have the capacity to provide Internet access when developed to that point
Restricted Access	The ability to restrict access and to differentiate between access rights for different types of users e.g. court staff, lawyers, general public
Client Server/Multi-User Access	The capacity to allow many people access to the system at any one time
Remote Access	Dial-in from modem
Audit Trail	The ability to determine who has accessed the system, when, and for what purpose
Electronic Signature	The system must contain all of the security elements for electronic storage of signatures
Financial	The ability to track, collect and analyze daily financial information and ledgers, and to produce invoices automatically
User Friendly	The system should be easy to use and Windows based. It should feature simple report and retrieval functions and a variety of formats. It should also support a private and public notes facility which would allow a judge, for example, to enter their own private notes about a case or to share information with others using the public notes

Conclusion

Civil case management is a centrepiece of the recommendations earlier put forward by the Civil Justice Review and re-enforced in this *Supplemental and Final Report*. Its implementation is essential to the successful fulfilment of our "vision" for a modern civil

justice system that is speedier, less costly and more effective, as well as "just".

RECOMMENDATION

We therefore recommend that a province-wide system of case management for civil cases, as described in this Chapter, be adopted and implemented in Ontario, and that the draft set of case management rules contained in Appendix 2 to this *Supplemental and Final Report*, be enacted (with the modifications noted) to effect that result; the proposed system of case management and rules to encompass at least the essential elements as described herein, namely:

- **Case Management Teams, consisting of Judges, Case Management Masters and Case Management Co-ordinators;**

- **a single set of Case Management Rules for all civil (non-family) actions and applications commenced in the Ontario Court of Justice (General Division);**

- **court monitoring only after defence;**

- **two "tracks" of cases, namely a "fast" track and a "standard" track, with flexibility for dealing with cases requiring more intensive case management built into the system through the case conference mechanism;**

- **the streamlining of time guidelines through the provision of only two mandated time limits, namely,**

  a) **an ADR Session within 2 months of the filing of a first response; and,**

  b) **a Settlement Conference within 3 months of the close of pleadings for fast track cases and within 8 months for standard track cases;**

- **sanctions for failure to comply with case management timelines, including the imposition of costs, the dismissal of actions and the striking out of pleadings and affidavits;**

- **the integration of ADR and mandatory referral of all civil (non-family) cases to mediation after the close of pleadings;**

- **three types of conferences, namely a case conference, a settlement conference, and a trial management conference;**

- **automatic dismissal of proceedings for cases where no defence is filed or steps taken by the initiating party to obtain judgment within 6 months of initiation of the proceedings;**

- **fast track treatment for Simplified Rules Cases; and,**

- **a properly functioning technology infrastructure with the minimum hardware and software features described herein.**

a. Transitional Provisions

There will be numerous issues of a transitional nature to contend with. In this regard we make the following recommendations:

RECOMMENDATION

We recommend that the proposed civil case management rules apply to all actions and applications commenced after the "implementation date" of case management in accordance with the direction of the Chief Justice.

We further recommend that, in order to avoid an ongoing backlog of existing cases, the following transitional provisions should apply to proceedings commenced before the implementation date, namely that:

(i) if the proceeding is undefended the initiating party should have 6 months from the implementation date to move for judgment or the case will be automatically dismissed by the Registrar; and,

(ii) if the proceeding is defended, a Settlement Conference should be arranged within 12 months from the implementation date or the case will be automatically dismissed by the Registrar; and that,

(iii) if other transitional issues arise in the case, they be dealt with by a Judge or Case Management Master in the context of a case conference.

b. Advisory Committee

It is important, in our view, that an Advisory Committee be established to provide advice with respect to the implementation of case management and to monitor how the case

management system which is implemented, and the rules relating to it, are working.

RECOMMENDATION

We therefore recommend that a Civil Case Management Advisory Committee be established, composed of representatives of the Bench, Bar, Ministry and Public, to develop plans for the implementation and roll-out of case management across the Province, to monitor the operation of the case management system and the rules, and to recommend to the appropriate authorities, including the Civil Rules Committee, changes in policies and procedure necessary to facilitate case management.

c. Timing of Implementation

It is neither feasible nor sensible that case management be implemented on a province-wide basis immediately and all at once. Plans are already underway, however for the expansion of case management from 10% of civil cases to 25% in Toronto, and the initiation of 100% case management in Ottawa by the beginning of next year, and we believe that a reasonable target for the province-wide roll-out to be completed is by the year 2000.

RECOMMENDATION

We therefore recommend that the proposed case management rules be implemented in Windsor and Sault Ste Marie (two of the pilot project centres), and in Ottawa in early 1997; that Toronto (the third pilot project centre), which is presently operating on a basis of 10% case management, expand to 25% by early 1997 and move towards 100% on a graduated basis. Finally, we recommend that the province-wide roll out of case management be completed by January 1, 2000.

CHAPTER 5.2

ALTERNATIVE DISPUTE RESOLUTION

> Members of the public should have the option to select the process which is most suitable to the resolution of their particular dispute, as well as the facilities to enable them to make that choice. Alternative dispute resolution -- or "ADR" as it is commonly known -- offers an important panoply of techniques for achieving this goal, particularly in conjunction with the rubric of caseflow management.[1]

Introduction

Issues concerning "alternative dispute resolution" (ADR) were deferred to our final Report. In our *First Report*, we recommended:[2]

- that the Law Society proceed to implement the proposals of its Dispute Resolution subcommittee and, in particular, its draft proposal to amend the Rules of Professional Conduct to place a positive obligation on lawyers to inform their clients of alternatives to litigation and to respond to proposals for the use of alternative methods of dispute resolution;

- that the concept of court-connected ADR be accepted in principle, but that the determination of the appropriate form of service model and funding option should await the evaluation of the ADR Centre pilot project;

- that early screening and evaluation mechanisms be built into the caseflow management structure to be implemented in the province; and

- that standards be developed by the ADR profession, in conjunction with the Law Society of Upper Canada and other appropriate professional organizations, for the accreditation of ADR practitioners who provide service to the public either privately or through court-connected facilities.

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[1] *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995), at p.210 [hereinafter "*First Report*"].

[2] *Id.*, at p.223.

Amendment to Rules of Professional Conduct

In our *First Report*, we noted that the Law Society had recently completed an examination of the role of lawyers with respect to ADR and that its Dispute Resolution Subcommittee had recommended, among other things, that "the Rules of Professional Conduct should be amended to place a positive obligation on lawyers to inform their clients of alternatives to litigation...".[3] The Task Force recommended that the Law Society act on this recommendation.

It has done so. In May 1996, the Law Society adopted this proposal and amended Rule 10 of the Rules of Professional Conduct to include the following requirement:[4]

> [That] the lawyer should consider the appropriateness of ADR to the resolution of issues in every case and, if appropriate, ... should inform the client of ADR options and, if so instructed, take steps to pursue those options.

This new obligation placed on lawyers underscores the increasing importance that is being given to alternative methods of dispute resolution in the civil justice system, and the need to ensure that accessible and accredited ADR services are available.

The Court-Connected ADR Centre - The Evaluation

The ADR Centre of the Ontario Court of Justice (General Division) was the first court-connected ADR program in Canada. It was introduced in the Toronto Region as a pilot program in October 1994, for the purpose of testing whether the availability of ADR techniques improved the conduct of civil cases.

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[3] Law Society of Upper Canada, *Alternatives: Final Report to Convocation, The Law Society of Upper Canada Dispute Resolution Subcommittee of the Research and Planning Committee,* (February, 1993); as referred to in *Alternative Dispute Resolution and Canadian Courts: A Time for Change*, prepared for presentation at the Cornell Lectures, Cornell University, July 1994, by the Honourable Mr. Justice George Adams and Naomi L. Bussin, at p.27.

[4] *Professional Conduct Handbook* (Toronto: Law Society of Upper Canada, 1996 edition), at p.35.

The pilot project was designed and implemented by a Steering Committee comprised of representatives of the Bench, Bar and Ministry of the Attorney General. In addition, an ADR Users' Committee was established to consider improvements to the operation of the Project. The ADR Centre is staffed by a Project Director and four dispute resolution officers, two full-time and two part-time. While the funding for the Centre was originally to end on March 31, 1996, it has been extended pending a final decision about the role of mediation in the civil dispute process and the development of an appropriate transition plan.

Matters pertaining to the ADR Centre are governed by a Practice Direction, which provides that the primary objective of the Centre is to ensure "enhanced, more timely and cost-effective access to justice for both defendants and plaintiffs".[5]

Four in every ten cases filed at the General Division Court at 361 University Avenue are referred to the ADR Centre. Applications, family matters, motor vehicle claims, and construction liens are excluded. Referral occurs after a statement of defence has been filed. Mediation sessions, which are normally arranged for two hours, are scheduled within two to three months of the filing of the statement of defence.

The results of the Pilot Project were evaluated by an external team led by Dr. Julie Macfarlane of the Faculty of Law, University of Windsor.[6] Dr. Macfarlane released her report (the "*Macfarlane Evaluation*") on November 30, 1995. It concludes that the ADR Project has provided a cheaper, faster and more satisfactory result for many of the cases referred there.

More specifically, the *Macfarlane Evaluation* revealed the following:

- about 52% of cases that are referred to the Centre attend a mediation session; 54% of those that attend a session settle; cases that settle do so generally before

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[5] *Practice Direction - ADR Centre* (1994), 16 O.R. (3rd) 481, at p.483.

[6] Dr. Julie Macfarlane, *Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (November 1995) [hereinafter "*Macfarlane Evaluation*"]. Dr Macfarlane's evaluation covers cases referred to the Centre from January 1, 1995 to September 30, 1995.

discovery;

- cases that settle at the ADR Centre do so in half the time of non-referred General Division cases that settle before trial (mean time of 124 to 129 days versus over 200 days);

- about 15% of cases referred to the Centre settle before the scheduled mediation session, suggesting that referral to the Centre helps to promote settlement in some cases;

- a majority of lawyers and clients, both in cases that settled and those that did not, were satisfied with the process;

- a majority (over 95%) of lawyers and parties, including those whose cases did not settle, said they would participate in ADR again;

- 62% of lawyers stated that they would not have fared better at trial than they did in mediation. Of those who felt they would have done better in trial, many believed that success would have been offset by the extra cost and time to get to trial. *One lawyer called it the difference between a better legal result and a better client outcome*;

- a majority of lawyers (70.4%) and clients believed that their case would have settled at a higher cost if it had not been referred;

- a majority of lawyers considered that the referral saved legal costs to their client both in cases which did and did not settle there;

- the mediators were one of the most liked and most disliked aspects of the program;

- a majority of lawyers "welcomed" the referral;

- the opt-out process -- in other words presumptively mandatory referral -- attracted negative comment from only a small number of lawyers with a few lawyers commenting that "if the process were not based on an opt-out system, it would be difficult to persuade people to use ADR at all";

- the majority of lawyers did not see the timing of the referral as a problem;

- reduced costs and faster resolution of the dispute were the most important reasons given by the majority of lawyers for proceeding with a mediation session; and

- the two most common things lawyers would change about the program were the scheduling process (it did not allow counsel any choices over scheduling but instead simply notified them of a first date and time) and the mandatory selection of mediator.

Drawing upon the foregoing, the *Macfarlane Evaluation* arrived at a number of conclusions, including the following:[7]

- that there is strong and broad approval for the availability of ADR as part of the litigation process;

- that there is no significant opposition among lawyers or litigants to the mandatory nature of ADR in the pilot program and that referral to ADR should continue on an 'opt-out' basis after the filing of the first statement of defence.

Integration of ADR into the Case Management Model

a. "Screening" and mandatory referral to ADR

The *First Report* recommended that "early screening and evaluation mechanisms be built into the caseflow management structure to be implemented in the province".[8] Referral to ADR is one such mechanism.

After further consideration, we are of the view that there should be mandatory referral of all general civil cases to a three hour mediation session, to be held following the delivery of the first statement of defence, with a provision for "opting-out" only with leave of a Case Management Master or a Judge. While this endorsement of mandatory referral to mediation may appear at odds with our earlier recommendation with regard to screening through a Judicial Support Officer (now Case Management Master), we have been persuaded that mandatory referral is the most appropriate option, for a number of reasons.

The evaluation of the ADR Pilot Project found that 40% of the cases referred to

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[7] *Id.*, at pp. 71 - 73.

[8] *First Report, supra,* note 1, at p.223.

mediation resulted in settlement in the very early stages of the case, thereby reducing court caseloads and the costs of litigation. Lawyers reported that legal costs were reduced even for cases that did not settle. In our *First Report*, we estimated the cost of a typical civil case to a litigant to be in excess of $38,000.00.[9] These costs are substantial and well beyond what the ordinary citizen of this province can afford to pay.

Even where there is no settlement as a result of the referral, the parties are forced at an early stage to evaluate the merits of their case. The research is clear that the opportunity for settlement increases whenever counsel are required to open their file and think about their case in a substantive way -- the "pick-up factor", as it were. This factor may serve to explain why 15% of cases settle before attendance at an ADR session.

The settlement results of the pilot project are impressive. The fact that referral to mediation can achieve an early resolution of 40% of cases within two to three months of the filing of a statement of defence, has caused us to reconsider our earlier view that all defended cases should first go through a form of screening process with what will now be a Case Management Master. Given the limited nature of court resources and the findings of the *Macfarlane Evaluation* with regard to screening, the Review has determined that the screening and evaluation process is most effectively achieved through an early mandatory referral to mediation.

We have been further persuaded that all types of civil, non-family, cases should be subject to referral to mandatory mediation. In making this recommendation, the Task Force acknowledges the controversy over whether all civil cases are suitable for mandatory referral. For example, there is a common perception that cases involving personal injury claims generally are not candidates for early mediation because the injuries need "to mature" before settlement can be reached. There is also some sense that early mediation in simple collection matters or cases involving straightforward claims for goods sold and delivered may only foster

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[9] *Id.*, at pp. 143 - 144.

delay on the part of defendants. However, the experience at the ADR Pilot Project does not necessarily bear out these common perceptions. As stated in the *Macfarlane Evaluation*:[10]

> The area of law in which a claim is brought was not considered by lawyers to be as significant in evaluating the suitability of a case for early ADR...[and] the data does not suggest that any of the case types currently referred to the ADR Centre are not susceptible to mediated settlement. Settlement has been successful at the Centre across a wide range of case types.
>
> As a consequence, there appears to be no argument for screening out cases by area of law. Screening out cases by internal case characteristics (such as legal or factual 'complexity', above) seems unrealistic. Such a process would be time-consuming and would risk both unreliability and rigidity. The screening function is better left to a well-informed Bar.

We believe, on balance, that a general referral of all types of civil non-family cases is preferable, provided that the referral process undergoes continuous monitoring and evaluation in order to identify potential problems.

As to the mandatory nature of the referral, the literature on the subject reveals that parties do not opt-in to voluntary systems.[11] The *Macfarlane Evaluation* also found that counsel were aware of this, and noted that:[12]

> A few made the further comment that if the process were not based on an opt out system, it would be difficult to persuade people to use ADR at all.

The majority of counsel who responded to the pilot project evaluation were satisfied with the mandatory nature of the referral -- 58% of lawyers "welcomed" the referral to the

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[10] *Macfarlane Evaluation, supra*, note 6, at p.72.

[11] See, for example, Rosenberg and Folberg, "Alternative Dispute Resolution: An Empirical Analysis" (1994), 46 Stanford L. Rev. 1487; and Brazil, "Institutionalizing Court ADR Programs", in Sander (ed.), *Emerging ADR Issues in State and Federal Courts* (Chicago: ABA Litigation Section, 1991) 52.

[12] *Macfarlane Evaluation, supra*, note 6, at p.26.

ADR Centre.[13] Dr. Macfarlane concluded that:[14]

> The evaluation did not find any significant opposition among lawyers or litigants to the mandatory nature of ADR in the pilot programme. Indications of low take up rates from voluntary programmes suggest that the mandatory nature of referral (with the possibility of 'opt-out') should be continued.

She also noted the following comment made by one counsel:[15]

> I have no problem with the process being fairly coercive. It is a waste of taxpayers money for so many cases to go to trial. There is plenty of coercion anyway in the litigation system which we accept, for example rules about cross-examination and so on.

It is important that the cost and time-saving benefits of ADR be maximized. This is best achieved, in our view, if participation is mandatory. Accordingly, the Review concludes that referral to ADR must be mandatory subject to an opt-out *by exception only* by way of a motion to a Judge or Case Management Master. The decision of the Judge or Case Management Master should be appealable only with leave.

RECOMMENDATION

The Task Force recommends the mandatory referral of all civil, non-family, cases to a three hour mediation session, to be held following the delivery of the first statement of defence, with a provision for "opting-out" only upon leave of a Judge or Case Management Master. The session should be conducted by a mediator selected by the parties from a list of accredited mediators or, failing agreement by the parties, by a mediator selected from that list by a Judge or Case Management Master.

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[13] *Id.*, at p.24.

[14] *Id.*, at p.72.

[15] *Id.*, at p.26.

b. The Form of ADR

At the outset, it was contemplated that the court-connected ADR Centre in Toronto would offer both mediation and early neutral evaluation. In fact, very few early neutral evaluation sessions were conducted overall and the *Macfarlane Evaluation* does not focus on the subject. Where these sessions took place, they were conducted by a judge and usually occurred in connection with a scheduled mediation session and where one or more of the parties felt it was important to have an opinion on the probable outcome of a particular issue. In that sense, early neutral evaluation can help the parties better define their interests for purposes of the mediation session, or post mediation, with regard to further settlement discussions. Early neutral evaluation can play a significant role in the settlement of cases where it is integrated with other forms of ADR and case management.

Members of the Bar are very supportive of an early neutral evaluation option if a referral to ADR is to be integrated into the case management process. We have some concern, however -- based upon the experience at the ADR Centre -- that parties and/or lawyers who generally resist the concept of ADR, will request a referral to early neutral evaluation as a means of avoiding the mediation process. It must be emphasized that the Civil Justice Review has premised its recommendation of mandatory referral to mediation on the basis of the established success of that form of ADR in achieving settlements in the early stages of litigation. It is our view that, while very useful in some circumstances, early neutral evaluation should be the exception and not the rule in the early referral mechanism.

There is always scope for the use of any and all forms of ADR in the dispute resolution process. Other options, such as mini-trials, we envisage being integrated into the process at later stages, if necessary, and in the context of the case management system.

c. Timing of the Referral

Our recommendation with regard to mandatory referral to mediation includes the requirement that the referral take place after the first statement of defence has been delivered. The timing of the ADR session is another area in which opinions differ. However, we are strongly of the view that early mandatory direction to ADR at the post-defence stage is the

most appropriate for the majority of cases. The experience of the Pilot Project indicates that early referral at this stage of the proceeding is not as contentious as had been anticipated. According to the *Macfarlane Evaluation*:[16]

> Some negative comments had been anticipated over the *timing* of referral to the ADR Centre, which takes place after the filing of the first statement of defence (that is, before close of pleadings in cases involving counter-claims or more than one defendant party). It was expected that counsel in some cases would feel that settlement discussions were premature when they took place before discovery.
>
> However, results suggest that the timing of the referral is not seen as a problem by the majority of lawyers. Survey respondents were asked if they felt that they had adequate opportunity to prepare for settlement discussions given the time of the referral. 79.6% replied that they did, and only 10% cited more time needed to prepare as a reason for asking for an adjournment. Of the minority of all lawyers who complained that the timing of the referral gave them inadequate time to prepare, defendants' lawyers were proportionally over-represented. Defendants' lawyers comprised 70.5% of those who said that they had inadequate time to prepare.
>
> An even larger majority of the interview group (88.2%) replied that the stage at which this case was referred to the Centre allowed them to adequately prepare for settlement discussion. Nearly 60% of this group explained their answer by saying that either the issues were already clear at the stage at which the case was referred (that is, after filing of the first statement of defence), or that the case was not complex and did not need to proceed to discovery in order for settlement discussions to take place.

In her *Conclusions and Recommendations*, Dr. Macfarlane states:[17]

> Settlement before discovery reduces both the number and amount of cost items. Fewer events in the life of a law suit reduce costs to both the user and the taxpayer. Evaluation data shows that the ADR Centre has been successful in increasing the settlement rates for cases between the filing of a statement of defence and discovery. 13% of cases for which a statement of defence has been filed in the Case Management stream settle before discovery. 25% of cases referred to the ADR Centre following filing of a statement of defence are settled at the Centre. Another 17% of cases referred to the Centre settle before mediation. Evaluation data suggests that in some of these

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[16] *Id.*, at p.25.

[17] *Id.*, at pp. 71 - 72.

cases, referral to the Centre may have provided a catalyst to settlement prior to mediation.

The ADR Project Steering Committee, referred to earlier, is of a similar view. With regard to the minority of lawyers who believe that mediation should not occur until after discovery, the Steering Committee responded as follows:[18]

> The Committee feels that this position misconceives the purpose of mediation. Mediation aims to express both parties' interests in the dispute and work on ways in which the dispute can be resolved. Nothing compels the parties to agree to any particular resolution. Therefore, their ability to "win" a fight is less important than their ability to persuade the other side to consider their interests seriously. That can be done early in the dispute.

The Task Force agrees.

d. Integration with Case Management

Referral to ADR must be effectively integrated with the proposed case management system. We contemplate that such integration will occur in the following way.

First, the initial mediation session will lead to one of the following results:

(1) a mediated settlement; or

(2) if no settlement is reached, either:

(a) an agreement to some other ADR Plan with notification to the relevant Case Management Team and with a "report back" time to the Team to ensure the case stays on the proper track;

or,

(b) a referral back to the case management process.

Where the case comes into the case management system -- either in the foregoing

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[18] ADR Project Steering Committee, "*The Future of the ADR Centre - Policy Options*" (December 1995), at p.9.

fashion or through the failure of the parties to follow through with the referral process in a timely fashion -- an initial case conference will be held with a Case Management Master or Judge who will:

- canvas again with the parties whether all reasonable ADR channels have been exhausted and, if such is not the case, develop an ADR Plan and timetable for the matter, with the parties' agreement, subject to appropriate "report backs" to the Case Management Team;

or,

- establish a case timetable and place the matter on the appropriate case management track.

The ADR component of case management should not present new opportunities for those who wish to cause delay. It is therefore critical that the referral to mediation be integrated into the case management timetable or "track" and that the overall timetable established for the completion of the case not be unduly extended to accommodate this referral.

In this vein, we feel it appropriate that where a failure to follow through with the mandatory mediation referral procedure cannot be justified by a party or their counsel, the Judge or Case Management Master should have the power to order the party or the party's solicitor to pay costs occasioned by the delay in failing to do so.

Appropriate Form of Service Model and Funding

The Review recognizes that if referral to ADR is to be mandatory, the process needs to be guided by clearly articulated principles. The ADR Project Steering Committee identified the following factors as important for court-connected ADR programs in the policy options presented to the Ministry of the Attorney General:[19]

- ADR should be equally accessible to all disputants, at least to the extent that the services of the Court now are;

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[19] *Id.*, at p.4.

- ADR should be affordable;
- if referral is mandatory, the parties should have a choice of who will mediate;
- the quality of mediators should be high and reliable;
- the system should be cost-effective to the parties (i.e. they get good value for their money) and to the court system (i.e. disputes get resolved economically and well); and
- the system can be expanded in due course to the whole province of Ontario.

The Review agrees that the model for providing court-connected ADR should ensure that these principles apply.

a. ADR must be court-connected

Our *First Report* identified two factors that support the conclusion that ADR programs should be available to the public as part of the "court" system. The first relates to the obligation of the state to ensure the availability of different forums and processes for the resolution of disputes. The second refers to the smooth fit between ADR and a caseflow management system. The results of the *Macfarlane Evaluation* of the ADR Pilot Project strongly support our earlier recommendation that the concept of court-connected ADR be accepted in principle. The author concludes that:[20]

> Mandatory referral should be predicated upon a continuation of the relationship between the ADR pilot and the Ontario Court (General Division). The ADR Centre model (a Court office located away from the Courthouse) was evaluated very positively by both lawyers and clients. It is not known what response would have been given had the service, for example, been located in the Courthouse itself, or alternatively, operated by a private ADR firm. However, one possible interpretation of the very positive evaluations of the Centre's service and facilities is that its supervision by the Court ensures its credibility in the eyes of clients and counsel.

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[20] *Macfarlane Evaluation*, *supra*, note 6, at pp. 73 - 74.

The provision of ADR under the auspices of the Court also ensures the accountability of the service to the Court itself, and through the Court to the public.

b. Service Model

The appropriate form of ADR service model, in our view, must conform to the following principles:

- affordability
- accessibility
- choice
- quality
- cost-effectiveness
- expandibility

Both the *Macfarlane Evaluation* and the *Options Paper* prepared by the ADR Project Steering Committee include service model options. These options also address funding. Essentially, there are four potential models for the provision of court-connected ADR services:

1. A Court-based system with public employee mediators on staff who are,

   - fully publicly funded through the government estimates process; or,
   - financed on a cost recovery basis through filing fees;

2. A Court-based system with a mix of staff and private mediators, with the funding options described above;

3. A Court-based system with private sector mediators who are,

   - paid through public funding mechanisms; or,
   - paid directly by the parties;

4. A fully private system, in which the Court encourages the voluntary resort to ADR.

Option 4 is not being considered here, as the Review believes that mandatory participation is required in order to maximize the benefits of ADR. In order to protect the integrity of the court connection, it is fundamental that the private ADR providers be properly accredited and that the administration of the program remain the responsibility of Courts

Administration, with ultimate responsibility for the supervision of the process residing in the judiciary.

(i) Staff Mediator Option

The staff mediator option underlines the Court's commitment to the ADR process. It simplifies the issue of quality control and ensures the availability of mediators. As well, it enhances the ability to control costs. At the same time, however, it is the most costly option from the perspective of public funding, and therefore is unlikely to be acceptable to government in the current environment of fiscal restraint.

There are additional problems with this option, from our point of view. From a cost perspective, it is important to note that the mediators must be paid whether a mediation proceeds or not, since they are on salary and "in house". Moreover, the model lacks flexibility in that it limits the parties' right to choose their mediator, a matter which is of concern to the bar and the public, and a right which we believe is important in a "mandatory referral" regime.

(ii) The "Private" Mediator Option

The use of private mediators gives the parties the greatest amount of choice with regard to their mediator. Such a model contemplates that a roster of qualified mediators will be established and an appropriate accreditation process is in place. We will return to a consideration of the difficulties surrounding qualifications, standards and accreditation later in this Chapter.

There are, however, complications with a pure version of the private provider option. Access may be limited unless mediators agreed to a fixed rate of remuneration that is affordable by all -- a difficult and unlikely exercise. Moreover, a court-connected ADR program depending exclusively on external private mediators might not be possible in those parts of the province where there are not enough mediators, or not enough mediators with sufficient expertise, to ensure a reliable supply within a case managed timeframe.

Further, as we have said, if the mediation process is to be mandatory, parties should have the option to choose any mediator who is on the roster. But what if the desired choice is to go "off roster"? This is a troubling question because the court-connected nature of the mandatory referral process makes it equally imperative that the Court and the public be assured that mediators have been accredited. At the same time, there is a strongly held view among members of the bar that the parties should be able to resort to any mediator they perceive to be qualified and to pay that mediator's fees at the market rate. Similarly, they argue, the parties should have the option, at their own cost, to schedule more than one session with a mediator, or to come back to the mediator at a later stage in the litigation.

There is much to be said in favour of freedom of choice on the part of the parties and counsel. However, the integrity of the court-connected mandatory referral system that we envisage leads us to conclude that, in the first instance, the parties should be confined to "on roster" mediators, and that the fee for the first three hour session should be regulated. If the parties wish to make arrangements with the mediator for a further session, they may do so at whatever market rate they can negotiate.

Nonetheless, we do not rule out altogether resort to an "off roster" mediator. At the initial mandatory referral stage of the process, however, we believe that retention of "off roster" mediators should be permitted only with leave of the Case Management Master or Judge. In this way, the Court and the public will have some comfort that the person selected, although not on the accredited roster, is nevertheless qualified.

(iii) The Mixed Panel Option

The mixed panel option carries with it most of the pros and cons of each of the separate options. However, a mixed panel comprised of a small core of staff mediators -- either full-time or on contract -- along with an accredited roster of private sector professionals would ensure a supply of qualified service providers, particularly in those areas where the ADR industry is not yet sufficiently established.

Given the importance of choice of a mediator in a mandatory referral scheme, this option has much to offer. A roster of accredited private ADR providers best ensures that parties will have a number of mediators to choose from, while the availability of staff mediators ensures the availability of accredited mediators in areas where there are insufficient qualified private mediators.

RECOMMENDATION

The Review recommends that court-connected mandatory referral to mediation operate with a roster of accredited private sector mediators and that a mixed panel of staff and private sector mediators be made available in those locations where there is an insufficient supply of qualified private sector mediators.

c. Funding

(i) Cost Recovery

As courts are funded out of tax dollars, it can be argued that ADR should be funded in the same way -- particularly if it is court-connected. In a continuing climate of fiscal restraint and reduced funding from all levels of government, however, it is not realistic to expect that sustained financial support will be forthcoming to provide for a fully subsidized province-wide program. What is required is a service model that will minimize costs both for the taxpayer and litigants.

Minimizing costs to taxpayers, in our view, requires that a cost recovery model be used to fund the ADR system. In addition, if costs to litigants are to be minimized, the use of such a model dictates that the cost of the service provided be controlled. Otherwise users cannot be assured that the ultimate expense will not be so high as to deprive them of access to the most appropriate dispute resolution technique. Further, if a cost recovery approach to funding is to be used, it is important to determine from whom those costs will be recovered.

(ii) Imposing an ADR fee at the point of filing or at the time of referral

If a dedicated ADR fee were imposed in all actions, we believe that the costs of

implementing and administering the court-connected ADR program could be recovered. The technique of using a general surcharge on court filing fees to fund ADR is used successfully in California, for instance, and Professor Frank Sander, a recognized expert in the field, advocates that such a system is fairer than ADR user-pay fees "since the costs of improving the public dispute system are spread over all litigants, not simply imposed on the immediate disputants seeking to avail themselves of ADR procedures."[21]

We recommend that a fee be imposed at the commencement of the litigation, when the claim is issued, and also upon the filing of a statement of defence. While it is arguable that only those cases that are defended and referred to mediation benefit from the actual ADR session and, therefore, that other litigants should not have to pay, *all* participants in the system, and the public as a whole, benefit by having a process in place which leads to earlier settlements and less costly litigation. At the present time, our litigation process does not offer litigants their first settlement mechanism -- the pre-trial -- until *after* the matter has been listed for trial and a fee of $268 has been paid. In non-case managed settings, listing for trial typically does not occur until 2 or 3 years after the commencement of the case.

There are other methods of achieving the principles of affordability and accessibility in the funding of ADR procedures. One of those, as mentioned, is to require only the referred parties to pay for the mediation session and to establish a *pro bono* system for impecunious litigants. Such a system of needs assessment would ultimately prove difficult and costly to implement in a mandatory referral scheme and, in our view, the imposition of an additional fee on the broadest number of cases responds best to the tests of affordability, accessibility and cost-effectiveness referred to earlier.

If all litigants share the burden of funding the ADR system, the program can be provided at a much lower cost per litigant, and the imposition of a fee on *all* actions would remove any disincentive to use mediation. It is also preferable, in our opinion, that litigants

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[21] Frank Sander, "Paying for ADR" (1992), ABA Journal 105, at p.105.

pay one fee and that the Court, in turn, disburse the payment to the mediator chosen from the roster. In the first place, filing fees paid to the Ministry will finance the program. In the second place, the public is unlikely to accept, readily, the concept of having to pay a filing fee *as well as* a fee to the mediator. Finally, there will be much greater difficulty in gaining acceptance for regulating the private mediators' rates if the fees are not paid through the Court.[22]

The Civil Justice Review believes that a court administered ADR program can be funded through an additional filing fee of between $100 and $115 per party. This conclusion is based upon the imposition of such a fee on the party commencing the action, at the time of issuing the claim, and on defendants, at the time of filing their statement of defence. The calculations are rough, but they are predicated upon a three hour mediation session, with one hour of preparation time and some margin for administrative costs, and upon an estimate of the number of cases initiated, a 40% defence rate, and approximately 1.2 defendants on average per case. We estimate that such a scheme would pay the mediators at a rate of approximately $100 per hour for a three hour mediation session and one hour of preparation time.

RECOMMENDATION

We recommend that the court-connected mediation program be funded on a cost recovery basis from filing fees paid by all parties to an action.

We further recommend that, in order to contain the cost of a court-connected mediation program and ensure its affordability and accessibility, court roster mediators be paid a regulated fee.

(iii) Segregation of the ADR Fee

If the ADR program is to recover its costs from litigants and to disburse some of those

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[22] See Christine Hart, *Qualifications of Court Roster Mediators in Civil, Non-Family Cases* (October 1995), at p.8 (a paper prepared for the Civil Justice Review).

fees to private sector mediators, a method must be found to segregate a portion of the filing fees for this purpose. At present, monies received by court offices are deposited to the province's Consolidated Revenue Fund and merged with the government's overall revenues. As discussed in our *First Report*:[23]

> Consideration might be given, it seems to us, to redirecting some of those revenues, at least notionally, to modernizing and retro-fitting the civil justice system for the rest of the 20th and into the 21st century. At the very least, any savings that may be attributable to the re-design and re-organization of the system should be available to finance the changes necessary to bring about that re-design and that re-organization.

In some jurisdictions in the United States, ADR surcharges are imposed on court filing fees and the funds so generated are earmarked to offset fully the cost of operating the ADR service. An advantage of the surcharge is its visibility and the fact that it can be rationally connected to the services it supports. If it is established through ongoing evaluation that court-connected mediation should be discontinued, the surcharge should similarly disappear.

Ontario's experience with surcharges has been limited to surcharges for fines in criminal matters but this practice may provide a useful precedent in establishing a cost recovery model for ADR.

RECOMMENDATION

We recommend that the Ministry of the Attorney General and Ministry of Finance should investigate the possibility of imposing an ADR surcharge or some other regulatory scheme in order to segregate the ADR filing fee or surcharge from the Consolidated Revenue Fund.

d. A principled approach to court fees

Our recommendation that ADR be provided on a cost-recovery basis through the

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[23] *First Report*, *supra*, note 1, at p.141.

imposition of additional filing fees or a surcharge may appear to be at odds with the Review's concerns about the already high costs of litigation. We do not believe this to be so.

In Chapter 4.2 of our *First Report*, we listed the various stages in the present court process and set out the corresponding fees. In a typical court case which is listed for trial, fees paid will likely be in the vicinity of $750. Of this amount, the single largest fee is the $268 which it costs to list a matter for trial -- an event that is estimated to occur in only 5% of all cases. On the other hand, the ADR Pilot Project has demonstrated that mediation referral leads to the settlement of more cases earlier in the proceedings, thereby avoiding the more significant costs that are otherwise incurred later in the proceedings. In our view, therefore, it is preferable to impose an additional modest ADR surcharge fee at the beginning of the litigation, because all concerned -- including the public in general -- will benefit from the fruits of the ADR program.

Throughout our public consultations, we were repeatedly advised by members of the public that they had spent large amounts of money in the course of litigation only to settle in the end. We were repeatedly told how they felt excluded by the litigation and decision-making process. With the exception of the oral examination for discovery, much of the litigation process occurs without the litigant's participation, unless the matter proceeds to trial. It is difficult for litigants to relate the costs of the lawsuit to their own involvement with the case. With early mediation, the litigant is involved in the process immediately, and the connection between the fee and the process is clear.

The Review is not only concerned with "costs", but with what is "cost-effective" as well. Our concerns with regard to the high cost of litigation can be reconciled with the imposition of an additional fee where it can be demonstrated -- as it has been -- that the program which is funded by such a fee has the real potential to avoid or reduce litigation costs in the long run. We believe this to be the case with the ADR program.

In the final analysis, we are convinced of the need to develop overall policies with regard to setting court fees in the dispute resolution process. When one examines the current

tariff[24], it is difficult, if not impossible, to discern the policy basis for establishing some fees. Why should a motion cost only $48 and a trial record cost $268 when we were advised that the former creates so much more work for the Court than the latter? Clearly the time has come to establish policies for fees that reflect and support the case management policies of the Court.

RECOMMENDATION

We recommend that a Working Group comprised of representatives of the Ministry of the Attorney General, the Judiciary, the Bar and the Public be established to consider the matter of court fees and to develop principles and procedures with regard to establishing their amount.

Accreditation

The *First Report* of the Civil Justice Review highlighted the need for generally accepted standards for the ADR profession. Pending our *Supplemental and Final Report*, we asked Christine Hart, then the Director of the court-annexed ADR Centre, to explore several subject areas relating to the qualifications of court roster mediators. These areas included:

- standards for court roster mediators
- elements of a training program
- experience
- grand-parenting
- continuing education
- ensuring continuing competence
- code of ethics
- court orientation, and
- a body to oversee start-up

As part of Ms. Hart's inquiry, more than 300 letters were sent out requesting input from mediators, judges, members of the public who had used mediation services, tribunals employing mediation in their process, ADR educators, and lawyers across Ontario. A public consultation meeting was held in October 1995 in Toronto. Approximately 60 people attended

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[24] O.Reg 293/92, am.O.Regs. 272/94;359/94;802/94.

the meeting and oral presentations were made by mediators, educators, lawyers, mediation managers, representatives of the Law Society of Upper Canada, the Arbitration and Mediation Institute of Ontario and the Advocates' Society. An additional 24 written submissions were received subsequently.

Ms. Hart prepared a paper for the Review, entitled *Qualifications of Court Roster Mediators in Civil, Non-Family Cases*, to which we have earlier referred. She found that there were no set answers to the questions raised in many of the areas canvassed. In the end, she came to the following conclusion respecting the qualifications of a court roster mediator:[25]

> The only thing that is clear is that courts should not be looking for a single "perfect" qualification for a competent court roster mediator. What can be said, however, is that with a growing body of knowledge drawing both on the theoretical and on-the-ground experience, courts are increasingly able to identify the skills, experience and predispositions that are most likely to be found in a successful mediator, and to design an application process in which the applicant's knowledge and use of those skill can be fairly assessed.

Drawing upon the work encompassed in the paper, and upon other available research and experience, it seems to us that there are a number of key factors which, at a minimum, need to be reflected in any qualification/accreditation standards for court-roster mediators. They may be grouped in the following categories:

- training
- experience
- whether a legal background is necessary
- adherence to an ADR providers' Code of Conduct, and
- the need for liability insurance

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[25] *Supra*, note 22, at pp. 9 - 10.

a. Training

Forty hours of non-practice training is the current standard for a number of court-connected programs in the United States and other jurisdictions, and for a variety of ADR professional organizations. This standard, however, is being questioned. For example, the Ontario Association for Family Mediation and the Academy of Family Law Mediators now require 60 hours of training and are considering recommending twice that number, in addition to 20 hours of continuing education every two years. Whatever the number of hours for this type of training, the critical issue is the content of that training: it must produce competent mediation skills.

b. Experience

Experience standards for court roster mediators can be measured against the total number of mediations actually completed or they can be measured against the number of hours of practice. Standards vary broadly. For example, the Arbitration and Mediation Institute of Canada requires five mediations *brought to resolution* in the last year, and five years in the field for its Chartered Mediator designation. There is a recognized standard for family mediators of 100 hours of supervised practice.

It was suggested at the consultation meeting held in October 1995 that the adopted standard be 100 hours of supervised mediation practice or five *completed* mediations, whichever came first. Five mediations, based on our model of a three hour session, would fall considerably short of the standard of 100 hours. We note that the suggested standards make no reference to *successful* mediations, and it may well be difficult to determine success on the basis of settlement results alone.

What skill is to be gained from the experience requirement? This is a helpful question to ask, because it may be that all or only some of the skills in question are important. Is it reassurance that the ADR provider is comfortable in dealing with professional advocates? Is it skill in assisting parties to reach settlement? Is it an ability in a particular subject area? As

Ms. Hart states:[26]

> The types of mediation experience thought important will obviously be different for each program, but without any analysis of what the program hopes to learn from an examination of the court roster applicant's previous experience, picking a required number of mediations seems to be a rather meaningless exercise.

c. Legal Background

A review of research in court-connected mediation programs in the U.S. has shown that legal training is not a predictor of ability and skill as a mediator. Indeed, legal training as an advocate may sometimes make it more difficult to assume the non-judgmental role that is required of a mediator. Needless to say, of course, there are many skilled mediators who also happen to be lawyers, just as there are many who are not.

Nonetheless, whether legal training is required or not, there is recognition in the industry that court roster mediators must have a knowledge of the civil process that will be accessed if the dispute is not mediated successfully. In some instances, such as family law, it is critical that mediators have an awareness of the legal rights and entitlement of the parties.[27]

d. Liability Insurance

Liability insurance is not an area to be ignored. Already there have been a limited number of cases, we understand, in which proceedings have been commenced alleging that a court-connected mediator exercised undue influence on a party to settle. Other kinds of complaints can easily be foreseen. If private sector mediators are to provide court-connected mediation services, it is essential, in our opinion, that they carry liability insurance to protect clients -- and themselves -- in the event of professional negligence, and to ensure that the

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[26] *Id.*, at p.12.

[27] *Id.*, at p.15.

principled nature of the process is upheld.

e. Conclusion

The Civil Justice Review has not attempted to formulate with any precision the standards and qualifications which should apply to court roster ADR providers. We do not see that as our role. There is clearly a variety of views in the ADR community on these issues and, as Ms. Hart has pointed out, there is probably no single view which is a complete fit for the type of court-connected program recommended. As ADR's flexibility in "fitting the forum to the fuss" is one of its hallmark characteristics, so, too, should a flexible and tailored approach be taken to developing appropriate qualification and accreditation requirements.

We believe the time has come for the ADR service providers themselves to collaborate and articulate the criteria for court roster mediators. If the Court is to require referral to mediation as part of the case management process, it is in the interest of ADR professionals to respond to the call for an appropriate accreditation process. We urge the Government, in conjunction with the Court, the Bar, ADR service providers and the users of such services, to establish a satisfactory process to develop standards and an accreditation process for this growing industry.

RECOMMENDATION

We recommend that the Government of Ontario, in conjunction with the Court, the Bar, ADR service providers and the consumers of such services, establish a consultation process which will lead to the development of standards and an accreditation process for ADR providers in Ontario, with a view to having such standards and accreditation process in place within a one year period.

In the interim, until such time as a province-wide process is in place, we recommend that prospective court roster mediators be required to submit to an application procedure in which mediation training and experience, as well as knowledge of the court process, are assessed. We suggest that the ADR Project Steering Committee be authorized to develop

criteria for this assessment process, and that Local Advisory Committees be struck to review prospective mediator applicants based on those criteria, and to implement and monitor court-connected ADR programs where established.

ADR and Family Law

a. Referral to ADR in Family Law Cases

We do not want to leave the subject of ADR without a reference to its role in family law matters. The Family Law Working Group is developing a family law model with respect to ADR in the context of the new "early resolution focused" process for family law proposed in our *First Report*. In this regard, we stated:[28]

> The revised process stresses, through initial screening and diversion during the court proceedings, the importance of mediation and other dispute resolution options, where appropriate. The Review supports the availability of alternate dispute resolution facilities in family law matters, under judicial supervision, keeping in mind the importance of guarding against power imbalances which may exist between parties in such settings.

The place of ADR in family law matters cannot be addressed without first acknowledging the extent to which ADR mechanisms are already in place in that area. Indeed, many ADR techniques were pioneered there. Moreover, negotiation has always played a particularly important role in resolving family law disputes. Domestic contracts, for example, play a significant role in pre-planning the resolution of matrimonial conflicts. In addition, family law dispute resolution frequently calls on the expertise of outside professionals for assessments and counselling, and mediation services have long been a part of the process.

Family law is fertile ground for the use of ADR techniques. Where the parties have children, their relationship as parents must survive the dispute resolution process -- difficult as that may be. ADR is an appropriate process in such cases because, as opposed to a more adversarial process, it supports the preservation of long term relationships. As well, the desire

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[28] *First Report*, *supra*, note 1, at p.279.

to preserve the assets of a marriage for the partners and their children can also provide a powerful incentive to seek less costly adversarial solutions.

What has been lacking, however, is a systemic approach to the delivery of ADR services in family law matters. Moreover, the current litigation process exacerbates the already acutely confrontational elements of these cases by conferring a tactical advantage on the party who achieves the first success in an interim order of the Court.

At the same time, however -- while recognizing a climate which favours the role of ADR in family law -- one cannot ignore the existence of acrimony between the parties, and the presence of spousal abuse problems and power imbalances, all of which may skew the resolution process away from an alternate dispute resolution focus and even make the circumstances inappropriate for such methods.

The streamlined process for family law which we described in our *First Report* is an attempt to moderate those aspects of the court process that exploit the acrimony between the parties and block the search for more co-operative solutions. This newly designed process creates two distinct opportunities to integrate ADR services within a case-managed environment.

The first of these opportunities occurs in connection with the Information Centres that we described as part of the early education process. We stated:[29]

> In each courthouse, an information service should be available to outline the details about court proceedings -- what is required and what can be expected. It is hoped that information about local family law lawyers and alternate dispute resolution resources would also be available, stressing the value of the client and his or her needs. For cases involving children, information about the impact of parental separation and court proceedings would be available.

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[29] *Id.*, at p.276.

We went on to recommend that an information services video be prepared and that, except in emergency cases, parties should be required to view the video prior to instituting a court proceeding. We also proposed changes to the originating process for family law proceedings to include a section where the prospective litigant will be asked to describe what efforts have been made to use alternative dispute resolution techniques before resorting to the courts.

The second opportunity for the integration of ADR into a case-managed process will occur at the first family law case conference, which we propose be scheduled before a judge within two weeks of the deadline for filing a response. It is contemplated that early judicial intervention will take place *before* the first motion in order to avoid the "affidavit wars" which currently characterize interlocutory proceedings in family law disputes. At the first case conference, an overall case management regime would be established for the case, if settlement cannot be achieved and opportunities to consider how mediation might resolve all or part of the case would be explored again.

It is contemplated that the case management judge would play a more active role in the ADR referral process than might otherwise be the case in general civil matters. ADR in family law involves more than the mediation of interests, but also *legal rights* which are inextricably interrelated. While this dichotomy can be found in all civil disputes, it is of heightened importance in certain aspects of family law matters, having regard, in particular, to the impact of settlements and decisions on children. Thus there is an important function to be performed by judicial supervision in these circumstances.

RECOMMENDATION

We reiterate our previous recommendations made in the *First Report*, that:

- **the use of ADR in family law matters be considered at both the pre- and post-application stage of the proceedings;**
- **that, at the pre-application stage, potential family litigants be required to consider the use of ADR and indicate in the originating process whether they have used ADR techniques and, if not, why;**

- **that, at the post-application stage, the appropriateness of referral to ADR be considered at an early mandatory case conference to be held within two weeks of the deadline for the filing of the Response.**

b. Service Delivery and Funding

At the present time, there is veritable melange of ADR service delivery models in existence in the family law field. A few court locations have staff mediators on site. The new Family Court sites (that is, the expanded Unified Family Court sites) feature mediation services contracted for by the government. Differing community resources offer a variety of counselling and mediation services at a wide range of prices, including a number of services which are available for free. Legal Aid now requires settlement conferences as a condition precedent to authorizing a certificate to proceed to court; but in a large number of cases, the parties pay for these services themselves.

Applying a consistent model is difficult given the landscape of family law litigation in Ontario. Family law matters are currently dealt with in three different courts -- the Ontario Court of Justice (General Division), the Ontario Court of Justice (Provincial Division) and the expanded Unified Family Court. Even within the individual courts there exist differences in procedures and handling of cases. The province-wide implementation of the Family Court will resolve these problems eventually, but this initiative will not be completed in the short term.

It is not expected that government will be able to fund any more mediation services and again we are forced to consider other cost-effective models. We have recommended a surcharge to fund mediation in civil matters. This is problematic in family law given the fact that, at present, the Ontario Court of Justice (Provincial Division) does not impose any fees. Unlike the delivery model proposed for civil cases, we do not recommend, at this time, that all family law cases be referred to mediation after a case is defended. The new family law process that we have recommended emphasizes pre-application ADR and early *judicial* intervention. Under judicial supervision at an early case conference, selective referral to ADR will take place.

In other respects, the information services which we have proposed will serve to co-ordinate information with regard to available ADR services in the community and the cost of those services. Once a proceeding has been commenced, a panel of court approved ADR service providers could be used in cases where mediation is thought to be useful. As a condition of being on the panel, mediators would be required to provide services at a regulated fee, as well as *pro bono* services for those clients who cannot afford to pay. Needs assessment for these cases will not be as difficult as in civil cases since the Court will have access to financial information about the parties as part of the court record. At this time, Legal Aid authorizes a disbursement for up to five hours of mediation services. In this way, both access and affordability may be ensured for all.

RECOMMENDATION

We recommend that mediators used for family law matters must be on a court approved roster.

We further recommend that, as a condition to being on the roster, family law mediators be required to provide services at a regulated fee, as well as *pro bono* services for those clients who cannot afford to pay.

c. Child Protection Cases

Consideration must also be given to the appropriate role of ADR in child protection matters.

In child protection services today, workers are expected to ensure the safety of children and where possible to work with families, in a constructive and supportive manner, to strengthen the family's parenting capacity. Not all child protection matters come before the courts and the child welfare system has a legislative mandate to provide an array of services to clients on a voluntary basis. These services include counselling services which have a mediating dimension in many ways.

There are, however, many cases where it is essential to use the court, both to ensure a child's safety and also to address the public's interest in the treatment of society's children.

Within this context, the use of mediation in child protection work is complex and the trading off of interests is generally viewed as inappropriate and risky. Hence, there is a strong resistance to the use of mediation even where it is mandated, as is the case in Nova Scotia.

Both the British Columbia and Nova Scotia child protection legislation sanction the use of mediation at any stage.[30] A Nova Scotia study reports that 67% of child protection cases in Nova Scotia over a 14 month period were successfully mediated before any court involvement.[31] The range of issues being mediated was very wide, but a key to success was a clear set of referral criteria as every case is not suitable for mediation. Studies of mediation in child protection have been hampered by small sample size and absence of control groups. Yet, some benefits have been identified by these projects including the Centre for Child and Family Mediation in Toronto. A high rate of dispute resolution and user satisfaction was reported in mediated cases in Toronto.[32]

Some other benefits noted in the literature are significant cost savings, speed of resolution and durability of agreements.

Despite the historic resistance, there is growing evidence and recognition that mediation can be a useful tool in child protection cases.[33] Accordingly, the Task Force makes the

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[30] The *Child, Family and Community Service Act*, S.B.C. 1996, s.22 and the *Children and Family Services Act*, S.N.S. 1990, c.5, s.21(1).

[31] Savoury, Beals and Parks, "Mediation in Child Protection: Facilitating the Resolution of Disputes" (1995), 74 Child Welfare 743.

[32] Levinger and Rubin, "Bridges and Barriers to a More General Theory of Conflict" (1994), 10 Negotiation Journal 201, at p.204; and Maresca, "Mediating Child Protection Cases" (1995), 74 Child Welfare 731.

[33] Marvin M. Bernstein, *Child Protection Mediation: Its Time Has Arrived* (February 1996) (research paper submitted to Osgoode Hall Law School, Toronto, Ontario).

following recommendations.

RECOMMENDATION

We recommend the establishment of a Task Force to design a mediation process appropriate for child protection cases, including the establishment of province-wide criteria for case referral.

We recommend that, at this time, referral to mediation in child protection cases be voluntary and the consent of all parties be required.

We recommend that the government pilot and evaluate the results of child protection mediation in at least three sites in the province.

We recommend the establishment of a joint educational initiative directed at the family bar and child welfare personnel on the subject of mediation in child protection matters.

We recommend that the government consider amending the *Child and Family Services Act* to facilitate access to mediation at any point in the court process, but respecting the principle of early intervention.

We recommend that mediators used for child protection cases must be on the court roster and must have specific child welfare training.

CHAPTER 5.3
VENUE

Introduction

In our *First Report*,[1] we noted that the demand for courtroom facilities and resources is inconsistent across the province. Certain court centres are faced with backlogs of civil cases when, within reasonably short distances, there exist facilities and resources which are being under-utilized. In order to address this issue, we recommended that the Rules of Civil Procedure be amended to provide Regional Senior Justices with the discretionary authority to order, on their own initiative or at the request of one or more of the parties, that a proceeding be transferred from one court centre to another within the same Region.[2]

We further recommended that this authority extend to the transfer of a proceeding between Regions with the concurrence of the Regional Senior Justices of each Region in question.[3]

The Review decided to defer any further recommendations with respect to venue until the report of the Joint Committee on the Distribution of Civil Cases in Ontario had been completed.

Background: History of Civil Venue and Former Rule 245

Prior to 1985, "situs" provisions required that proceedings take place in a specified locale and limited the plaintiff's freedom to choose where to initiate a lawsuit. These provisions were found in individual statutes and in the Rules of Procedure. Where statutes or the rules were silent on the issue of venue, Rule 245[4] prescribed generally that the proceeding

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1 *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995) [hereinafter "*First Report*"].

2 *Id.*, at pp. 248 - 249.

3 *Id.*

4 Rules of Civil Procedure, O.Reg. 560/84.

should be commenced in the county where the cause of action arose and where the parties resided, subject to specific provisions governing mortgage and matrimonial actions.

In the sweeping changes which were made to the rules with the promulgation of the new Rules of Civil Procedure in 1985, the situs requirements of former Rule 245 were removed, and other statutes were amended to delete such constraints. There may have been differing rationales for such a change. The general organization of the courts in the Province along county and district lines had been eroding for some time. There was a sense that parties should be free to choose where to start their proceedings, and there may have been a feeling that "market forces" would prevail in the end and that, for the majority of proceedings, individuals would launch their cases in their respective vicinities, following the maxim that *justice is local.*

Whatever the rationale, however, the change has not worked. Many major centres have excessively disproportionate caseloads and, not surprisingly therefore, excessively disproportionate backlogs.

Joint Committee on the Distribution of Civil Cases in Ontario

The Joint Committee on the Distribution of Civil Cases in Ontario was formed in January 1994 by agreement between the former Deputy Attorney General, George Thomson, and the late Chief Justice of the Ontario Court, the Honourable F.W. Callaghan. The Committee was comprised of representatives from the Ministry, the Bar and the Judiciary.

The Committee was asked to consider:

(i) whether the civil venue provisions in Ontario law were contributing to the backlog of civil cases; and

(ii) better ways to apportion the civil caseload throughout the province to ensure a speedier and more efficient civil judicial process.

The Committee has prepared a draft Report[5] which the Task Force has had an opportunity to review. The Committee's preliminary findings and conclusions are generally consistent with our own. For instance, we are aware of no other jurisdiction which allows a plaintiff such complete freedom in initiating litigation anywhere in the province, and that freedom and the current civil venue provisions which permits it in Ontario have contributed significantly to the backlog at certain court locations. Moreover, all other common law jurisdictions, including other provinces, maintain some form of check on the location of filing and hearing of civil cases which allows for appropriate planning and allocation of resources.

Reform of the Current Venue Provisions

As discussed in our *First Report*, the subject of venue raises a number of important and difficult issues concerning the ability of litigants to determine where their proceedings should be dealt with, and about the allocation of judicial and court resources in the province generally.[6] Concerns have been expressed that parties and witnesses are being inconvenienced by the lack of venue rules, as many actions are being commenced in the province's major centres simply because the originating party's lawyer practices in the area.[7] It has been suggested that, with the return of venue rules, a more efficient use of the court system could be managed.[8]

It is estimated that upward of a third of cases in Toronto have no legal or factual connection with the Toronto Region. This makes it difficult to plan an efficient use of courts and staffing.

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[5] *Draft Report of the Joint Committee on the Distribution of Civil Cases in Ontario* (October, 1995) [hereinafter "*Joint Committee Draft Report*"].

[6] *First Report*, *supra*, note 1, at p.249.

[7] *Submission to the Civil Justice Review: Canadian Bar Association - Ontario, Civil Litigation Section* (December 19, 1995), at p. 4.

[8] *Id.*, at p.5; see, also, *Joint Committee Draft Report*, *supra*, note 5, at pp. 5 - 6.

It is clear that Ontario stands alone among common law countries in allowing plaintiffs near *carte blanche* in determining the place an action will be commenced, often to the detriment of other parties to the action. This freedom is bolstered by the heavy onus placed on defendants who wish to challenge the plaintiff's choice of venue and an inability on the part of the court to unilaterally order a change in venue.[9]

The Task Force is of the view that situs provisions should be reintroduced either in specific legislation or in the Rules of Civil Procedure, in conjunction with a general venue provision which would apply where specific legislation or rules were not applicable. We believe that the administration of justice would be greatly enhanced and the public better served if venue rules were in place which required a connection between where the litigation arose, the parties' residence and the place of hearing. It is our view that reinstatement of comprehensive venue provisions will result in a fairer and more appropriate allocation of caseload across the province, provide for greater caseload predictability, and eliminate the practice of "forum shopping".

RECOMMENDATION

We recommend that situs provisions be reintroduced into Ontario law. These situs provisions should be of both general and specific application and apply to both actions and applications. There should be a venue provision of general application such as former Rule 245 for proceedings not subject to specific situs provisions.

Judicial Transfer of Civil Cases

While there has been general support for the Review's recommendation that the law of venue requires reform, some concerns have been expressed with respect to our recommendation that the judiciary be given the authority to transfer cases.

The Bar, for example, has expressed some apprehension concerning the potential cost

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[9] *Joint Committee Draft Report, supra,* note 5, at p.3.

implications for litigants who could be required to travel to a new centre, as well as the impact on the ability of lawyers to plan effectively for hearings and trials. Concerns were also raised that cases might be assigned a lower priority on the list at the new court centre.

Notwithstanding these concerns, the Task Force is of the view that judicial transfer of cases is an important tool in the efficient management of the civil justice system. We recommend, however, that guidelines should be in place to govern such transfers. For example, we would suggest that, in making an order transferring a case, Regional Senior Justices be required to take into consideration all relevant factors. Further, the Task Force recommends that transfers between regions should only be ordered in exceptional cases, and provided the Regional Senior Justice of the region to which it is proposed the case be transferred has consented.

RECOMMENDATION

We recommend that the Regional Senior Justices should be given the authority to transfer cases to a different location for hearing or for trial, subject to the following considerations:

(a) An order transferring a case to another location should not be made without notice to the parties and without an opportunity for them to be heard. In making an order for change of venue, the judge should take into consideration the following factors:

- **cost to the parties;**
- **the parties' place of residence;**
- **where the cause of action arose;**
- **the availability of judges or trial dates at the proposed transfer location;**
- **the witnesses' place of residence;**
- **the need for special facilities;**
- **the distance to the proposed transfer location;**
- **the length of the proposed trial or hearing; and**
- **any other relevant factor.**

(b) **Transfers between regions should be ordered only in exceptional cases, and provided the Regional Senior Justice of the region to which it is proposed the case be transferred has consented.**

CHAPTER 6
SPECIFIC AREAS

CHAPTER 6.1

SMALL CLAIMS COURT

> The civil justice available in small claims courts has important implications for the integrity of law in general, given the pervasive "touch" of this court.[1]
>
> A casual and insensitive approach to the quality of justice [in small claims court] will indicate a fundamental class bias in a society's judicial system.[2]

Introduction

We did not advance as far with the issue of Small Claims as we might have liked. Why that is so will become apparent in the next few pages.

We heard a great deal about the Small Claims Court during the *First Report* consultation phase of the Civil Justice Review. Approximately 135,000 small claims are issued in Ontario yearly, as compared to approximately 178,000 civil proceedings begun in the other areas of the Ontario Court of Justice (General Division). Thus, in terms of numbers of disputes, the Small Claims Court deals with a very high proportion of cases in the Province,[3] and there can be no doubting the far-reaching implications for society of a satisfactory vehicle for the resolution of these types of differences between its members.

We heard that people generally liked the Small Claims Court as a forum to resolve smaller disputes. Several issues were raised regarding the court, however, including:

- whether the monetary jurisdiction of the court should be increased, as suggested

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1 Adams, "The Small Claims Court and the Adversary System" (1973), 51 Canadian Bar Review 585, at p.587.

2 Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), at p. 237.

3 *First Report of the Civil Justice Review* (Toronto: Civil Justice Review, March 1995), at pp. 284 - 285.

by users of the court;

- whether lawyers, paralegal agents and/or businesses should be excluded in order to preserve the "people's court" character of the Small Claims Court; and
- whether matters should be presided over by full-time Judges or part-time Deputy Judges.[4]

At the time of writing our *First Report*, we concluded that we were not in a position to make definitive recommendations regarding the question of small claims. A deeper study was in the process of being conducted by the Fundamental Issues Group of the Review, and the Simplified Rules procedure had not yet been adopted. Although we made a number of recommendations concerning the Small Claims Court -- which are restated later in this Chapter for clarity and reinforcement -- we felt that a more in-depth analysis of the small claims issue needed to await the development of the Fundamental Issues Group study and the evolution of the Simplified Rules initiative.

The Fundamental Issues Group has now completed its study on the Small Claims Court.[5] In addition, the Simplified Rules procedure for cases involving less than $25,000 has been put in place across the Province on a four-year pilot project basis. Little information is yet available as to how this latter concept is working and, in general, there remains a lack of adequate reliable data and information upon which to base well thought out proposals for an overall small claims system. The very comprehensive and thorough research efforts of Professor Iain Ramsay on behalf of the Fundamental Issues Group confirm this. They demonstrate, too, that broad policy issues need to be addressed and modern day objectives for such a system formulated before ultimate decisions about the appropriate type of forum and the appropriate type of processes for dealing with such disputes in the 21st century Ontario can be made.

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[4] During our consultations, it was suggested that the use of part-time Deputy Judges has resulted in inconsistencies in decision-making.

[5] See Ramsay, *Small Claims Courts: A Review* (October 25, 1995) [hereinafter "*Ramsay*"].

This is a task which extends beyond the mandate of the Civil Justice Review to propose "specific and implementable" solutions to existing problems in the system -- and so, we find ourselves, again, in a position to point to the need for further study and reform in an area but not able to complete the journey down that road. To this end, we content ourselves, at the outset of this Chapter, with outlining some of the overriding issues that we believe need to be addressed by the policy makers in respect of small claims.

The Policy Issues

Research in American jurisdictions has identified four reasons why society should be concerned about Small Claims Courts:[6]

- such courts provide "the forum where ... citizens are most likely to experience the legal system firsthand";
- the "way that courts manage and adjudicate small claims cases ... affects the opinions that many citizens hold of the fairness and effectiveness of the ... system";
- Small Claims Courts "perform an important societal function ... [as] the primary formal mechanism through which the majority of conflicts over contracts and personal injuries are resolved in [the] nation"; and,
- there are "important and enduring policy questions regarding the nature and purpose of small claims ...".

What are some of these "important and enduring policy questions"? Many of them centre around determining the true objectives sought to be attained by a small claims process. There have been a number of objectives attributed to Small Claims Courts during the course of their existence -- some of them historical, some practical, and some philosophical. Is the objective:[7]

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[6] Goerdt, *Small Claims and Traffic Courts: Case Management Procedures, Case Characteristics, and Outcomes in 12 Urban Jurisdictions* (Williamsburg V.A.: National Center for State Courts, 1992), at pp. 3 - 4 [hereinafter "*1990 Study*"].

[7] See, generally, *Ramsay, supra*, note 5, at pp. 10 - 12, and the research studies referred to therein.

- to provide an efficient and speedy mechanism for the collection of "smaller" debts by credit advancing institutions, other businesses, and individuals?

- to provide "access to justice" for individuals involved in "smaller" disputes -- wage earners, tradespeople, consumers?

- to present a broader and simpler "problem solving" forum -- as opposed to merely a "decision making" one -- where new ideas in dispute settlement such as mediation and ADR generally provide alternatives to the traditional adversary system in the higher courts? Or,

- to offer a channel for diverting claims from those higher courts, in order to reduce the heavy caseload in them?

These questions must be addressed, as well, in the context of a society which is increasingly referring a wide variety of disputes that might otherwise fall within the rubric of "small claims" to differing tribunals or agencies. Landlord and tenant matters, neighbourhood property disputes, human rights issues, questions involving employment standards and wages, workers' grievances in union environments, health and safety requirements, certain consumer disputes and environmental issues themselves, all fall within this category. Where does the traditional view of a "small claims" mechanism fit into such a landscape, and how does it do so?

When the policy questions surrounding objectives and context have been considered, the matter of the appropriate type of forum -- and the relevant processes to be utilized in that forum -- can more readily be resolved. What shape should that forum take? Is it something modelled in the fashion of the higher courts, but with a more informal and simplified procedure? Or is it something with a purely non-rights based, lay-participation and mediative focus on the resolution of differences? Or -- in true Canadian fashion, and in this multi-door dispute resolution age -- is it a composite of these approaches?

Whether the overall structure of the Small Claims Court system needs to be redesigned and, if so, in what fashion, are not matters that fall comfortably within the mandate of the Civil Justice Review. They involve considerations which are of a broader and more in-depth nature

than our search for specific and implementable solutions permits, although the studies conducted by the Fundamental Issues Group provide a valuable and interesting basis upon which to build. At the same time, however, the objectives, context and ultimate structure of small claims resolution in the Province are matters which do need to be reviewed and considered, in our view. We urge the Government to embark upon such an enquiry, in consultation with the Bench, Bar and Public. At a time when the movement for general reform in the civil justice area is gaining momentum and evoking results, the fit of this important area on the dispute resolution landscape needs to be completed. Accordingly, the Review makes the following recommendation.

RECOMMENDATION

We recommend that a Task Force be established to review the policy objectives and context of small claims dispute resolution in Ontario and the appropriate type of forum and process for the resolution of such disputes, and to make specific proposals in that regard.

In the meantime, there are issues respecting small claims that can be dealt with. We have made recommendations regarding some of them in our *First Report*, and reproduce them here for clarity:

WE RECOMMENDED THAT:

- **Small Claims Court proceedings across the province incorporate a standardized settlement conference/pre-trial process, with mediation-like services available as a part of that process where feasible;**
- **Lawyers who act as Deputy Small Claims Court Judges receive mandatory training for the performance of their duties, under the direction of the Committee of the General Division Judges in consultation with the National Judicial Centre. We also recommended that this training include training in mediation and that Deputy Judges be compensated, at their per diem rate, while attending such training sessions;**
- **The *Courts of Justice Act* be amended to provide for appeals from decisions of the Small Claims Court to a single judge of the Ontario Court of Justice (General Division) sitting in the region where the claim has been disposed of;**

- **The monetary threshold for appeals from final orders in Small Claims Court be established at $1,200 for the present, and that the threshold be established automatically at 20% of the maximum monetary jurisdiction of the Small Claims Court, as it may be prescribed by regulation from time to time; and**
- **Consideration be given to establishing an optional procedure for appeals to be presented in writing from final orders of the Small Claims Court.**

The balance of this Chapter deals with the three outstanding issues articulated at the beginning of the Chapter, namely:

- monetary jurisdiction
- the presence or absence of lawyers, paralegals and business claimants, and
- Deputy Judges

Monetary Jurisdiction

We have stated that accessibility to the justice system is one of the criteria against which the modern civil justice system should be judged. It is important that the civil justice system provide members of the public with access to a forum where they can have their smaller disputes resolved in an economic fashion. However, smaller disputes should not require the full panoply of procedural rights which dominate the superior court process.

The Small Claims Court is intended to be the forum where smaller disputes are resolved in a timely, inexpensive and informal manner. Concern has been expressed, however, that the court's current monetary jurisdiction may be limiting the system's ability to process and try the public's smaller claims in such a manner.[8]

During our consultations, we heard that for some members of the public there currently is no forum for the cost-effective resolution of certain claims. For instance, one small business person told us that, while the dollar value of his contracts was too low to make it economical

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[8] At present, the Small Claims Court has the monetary jurisdiction to deal with claims up to $6,000 in value: see *Courts of Justice Act*, R.S.O. 1990, c.C.43, s.23; O.Reg. 92/93 (in force April 1, 1993).

to bring a claim in the General Division, it was also too high for him to use the Small Claims Court.[9] Accordingly, despite having valid contracts upon which to sue, there was no cost-effective forum where he could bring his claims. The Review repeatedly heard that the monetary limit of the Court should be increased in order to provide cost-effective access to justice for such claims.

The General Division, however, has recently initiated a four-year pilot project pursuant to which Simplified Rules will be applicable to claims under $25,000.[10] The pilot project took effect on a province-wide basis on March 11, 1996. The expectation is that, with the availability of these Rules for claims under $25,000, the General Division will become more economically accessible; as a result, an increase in the monetary jurisdiction of the Small Claims Court would likely be unnecessary. Unfortunately, because the Simplified Rules have only recently been implemented, the Review is not in a position to know whether this expectation will prove to be correct.

In these circumstances, consideration of an increase in the monetary limit of the Small Claims Court must be postponed, in our view. It is premature to make such a determination. A formal evaluation process to determine the impact of the Simplified Rules initiative has been implemented. Baseline data on the current operations of the General Division with respect to claims under $25,000 has been established, which will ensure that a meaningful evaluation is carried out. It is important that consideration of an increase in the jurisdiction of the Small Claims Court await the results of this evaluation.

Further, with respect to increasing the court's monetary limit, we were cautioned

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[9] Most of his contracts are between $10,000 and $20,000. Reducing the dollar amount of his claim in order to be within the $6,000 jurisdiction of the Small Claims Court meant he would be foregoing a significant part of his claim. This was something he could not afford to do on a regular basis.

[10] R.R.O. 1990, Reg. 194, am.O.Reg. 533/95.

that:[11]

> It would be irresponsible to extend the jurisdiction of the small claims court without establishing accurate baseline data on the current operations of the court....
>
> [I]t is imperative that there be a proper attempt to study the impact of [an increase in jurisdiction] through a systematic empirical analysis of the business of the court.

In our *First Report* we commented on the limitations of current court statistics. This applies equally to the Small Claims Court. As noted by Professor Ramsay: "[t]he current statistics on the operation of the small claims court do not provide meaningful information on many important aspects of the work of the court."[12] The Review agrees.

In order to determine whether an increase in the court's jurisdiction will have the desired results, it is necessary that baseline statistics on the current operations of the court be established. This will allow a proper analysis of any future jurisdictional increase. It is important that this baseline data be available prior to increasing the court's jurisdiction.

These two factors taken together -- the unknown impact of the Simplified Rules in the General Division for cases under $25,000 and the lack of statistical baseline data on the current operations of the Small Claims Court -- make it inappropriate to recommend an increase in the monetary jurisdiction of the Court at this time.

RECOMMENDATION

We recommend that the monetary jurisdiction of the Small Claims Court remain at $6,000 for the present time, pending further consideration following receipt of the results of the formal evaluation of the Simplified Rules initiative.

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[11] *Ramsay*, *supra*, note 5, at pp. 4 and 5.

[12] *Id.*, at p.4.

In the meantime, we recommend that an empirical study be undertaken to establish baseline data on the current operations of the Small Claims Court. This study should include an evaluation of the Small Claims Courts at three sites across the province. The three sites should represent a large urban centre, a medium centre, and a smaller rural centre. This study should be completed and evaluated prior to any increase in the jurisdiction of the Small Claims Court being implemented.

Preserving the "People's Court" Character of the Small Claims Court

Despite not recommending that the jurisdiction of the Small Claims Court be increased at this time, the Review considers it important that concerns regarding the "people's court" character of the Small Claims Court be addressed. During our consultations many users of the court were concerned that an increase in jurisdiction might impact on its informal character. The reasons underlying this concern are twofold.

The first is that an increase in jurisdiction may lead to more parties using lawyers. The use of lawyers generally results in a greater level of formality in the court which can detract from its "people's court" character. Similarly, legal representation of one party is believed to impose increased pressure on the other party to hire a lawyer due to a perceived bias in favour of represented parties, particularly plaintiffs.

Secondly, it is suggested that, with an increase in jurisdiction, there will be an increased use by business plaintiffs. The presence of business litigants is thought by some to deter individual plaintiffs from bringing their claims to the Small Claims Court because of its "chilling effect".[13] The presence of business litigants is also believed to contribute to the image of the Small Claims Court as a debt collection agency. If accurate, these perceptions could well have an impact on the "people's court" character of the Small Claims Court.

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[13] See, for example, Weller, Ruhnka and Martin, "American Small Claims Courts" in Whelan (ed.) *Small Claims Court: A Comparative Study* (Oxford University Press, 1990) 5, at p.9.

Suggestions were therefore made to the Review that, in order to preserve the "people's court" character, consideration should be given to:

- excluding lawyers, paralegal agents and other representatives from appearing at trial; and
- preventing businesses from using the Court.

a. The Presence of Lawyers in the Small Claims Court

The National Center for State Courts has undertaken two studies of Small Claims Courts in a number of states, one in 1978 and one in 1990 (referred to as the "*National Studies*").[14] Both studies concluded that the level of legal representation increases as the monetary value of a claim increases. The evaluation of the British Columbia Small Claims Court program also supports this conclusion.[15] This is likely because the higher the dollar value of the claim, the more important it is to the party and the more uncomfortable they may feel about representing their own interests.

The *National Studies* also suggested that there "should be careful judicial control of the participation of lawyers"[16] in order to maintain a check on both the formality and length of trial. This suggests that the presence of lawyers will affect the level of formality and, in turn, the "people's court" character. The exclusion of lawyers, however, appears to be more

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[14] See Weller, Ruhnka and Martin, *Small Claims Courts: A National Examination* (Williamsburg, Va.: National Centre for State Courts, 1978) [hereinafter "*1978 Study*"]; *1990 Study*, *supra*, note 6. These studies are collectively referred to as the "*National Studies*". See, also, *id.*, and Goerdt, "The People's Court: A Summary of Findings and Policy Implications from a Study in 12 Urban Small Claims Courts" (1993), 17 State Court Journal 38, which discusses these studies respectively.

[15] Province of British Columbia, Ministry of the Attorney General, *Evaluation of the Small Claims Program* (December 15, 1992), at p.19. The evaluation shows that for those cases in the new jurisdiction range ($3,000 to $10,000) the proportion of unrepresented litigants was 55%, while for those cases in the old jurisdiction range (up to $3,000) the proportion of unrepresented litigants was about 70%.

[16] *1978 Study*, *supra*, note 14, at p.71; see, also *1990 Study*, *supra*, note 6, at p.69.

prevalent in U.S. Small Claims Courts[17]; in Canada, it would appear that only the province of Quebec currently excludes lawyers, and only for cases involving less than $3,000.

It has also been suggested that prohibiting lawyers in the Small Claims Court will correct the perceived bias in favour of represented parties. The Review is aware that there may be added pressure on a party to hire a lawyer due to this perceived bias. Studies have shown, however, that this perception is not entirely accurate. In fact, the *National Studies* have found that there is no bias in favour of plaintiffs who are represented and that being represented by a lawyer was not determinative of the outcome of a case.[18] In the *1978 Study*, however, there did appear to be a general bias against defendants, whether facing a represented or an unrepresented plaintiff.[19]

Based on these findings, the two *National Studies* concluded that there is no basis to exclude lawyers and that they should be permitted at trial in the Small Claims Court.[20]

The Review concurs with this conclusion and is of the view that it is not appropriate to exclude lawyers from the Small Claims Court. Some members of the public may be deterred from pursuing their claims in the Small Claims Court, particularly when larger amounts of money are involved, if they are not permitted to be represented at trial. Further, excluding lawyers carries the danger that the public will be less protected in situations where they face an experienced repeat litigant. The goals of the Small Claims Court are best achieved, in our view, by allowing parties the freedom to decide whether to use a lawyer.

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[17] According to the *National Studies*, in 1978, 5 of the 15 states that were considered in the study prohibited lawyers in their Small Claims Courts and in 1990, 7 of the 12 did: see *1978 Study*, *id.*, at pp. 10 - 12; and *1990 Study*, *id.*, at p.7.

[18] *1978 Study*, *id.*, at p.71; *1990 Study*, *id.*, at pp. 54 - 57, 68 - 69.

[19] See Weller, Ruhnka and Martin, "American Small Claims Courts", *supra*, note 13, at pp. 11 - 12.

[20] *1978 Study*, *supra*, note 14, at p.71; *1990 Study*, *supra*, note 6, at p.69; see, also, Weller, Ruhnka and Martin, "American Small Claims Courts", *supra*, note 13, at p.12.

RECOMMENDATION

We recommend that lawyers, agents, and paralegals should not be excluded from representing parties in the Small Claims Court.

In making this recommendation we are aware, however, that legal costs in the Small Claims Court can reach a level that is disproportionate to the amount at stake. It is important that the costs associated with legal services not outstrip the amount of the claim. The lawyer's right to fair and reasonable compensation should be balanced against the jurisdictional context of the Small Claims Court.

At present, provincial jurisdictions do not impose a cap on the fees lawyers can charge for small claims work. Other jurisdictions, however, have imposed such restrictions. For instance, in Germany, lawyers' fees in civil cases are based upon a regulated fixed percentage that varies with the value of the claim.[21] In England, the Right Honourable the Lord Woolf in his Final Report on the English civil justice system recommends that for those cases in the lower end (under £10,000, or about $22,000 Cdn.) which would be streamed to a fast track under a case management system, there should be fixed costs which would be directly related to the amount of the claim. In particular, he makes the following recommendations:[22]

- There should be a regime of fixed recoverable costs for fast track cases;
- The guideline maximum legal costs on the fast track should be £2,500 (or about $5,500 Cdn.), excluding VAT and disbursements;
- The costs payable by a client to his own solicitor should be limited to the level of the fixed costs plus disbursements unless there is a written agreement between the client and his solicitor which sets out clearly the different terms;
- The costs regime should reflect case value in two bands; up to £5,000 (or about $11,000 Cdn.), and up to £10,000 (or about $22,000 Cdn.). There should be two levels of costs within each value band, one for straightforward cases and the

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[21] See The Right Honourable the Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales* (June, 1995), at p.46.

[22] The Right Honourable the Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (July, 1996), at p.58.

other for cases requiring additional work.

RECOMMENDATION

We recommend that lawyers' fees be limited to a maximum of 40% of the jurisdiction of the Small Claims Court (currently $6,000). The lawyer would be entitled to compensation up to this maximum (which would currently be $2,400), subject to an agreement to accept a lesser amount, regardless of the outcome in the case.

b. The Presence of Businesses in the Small Claims Court

At present, it appears that the exclusion of businesses is more prevalent among U.S. Small Claims Courts than Canadian. According to the *National Studies*, in 1978, four of the fifteen states considered prohibited collection agencies in their Small Claims Court[23], and in the 1990 study, seven of the twelve states reviewed did.[24] Currently, it would appear that only the province of Quebec prohibits incorporated businesses from using the Small Claims Court. While the rationale for imposing such a prohibition is to prevent the "chilling effect" on individual plaintiffs referred to earlier, experience has shown that their presence does not deter individual plaintiffs from using the court.

The *National Studies* tested the "chilling effect" argument by comparing the filing rates by individuals per 1,000 of population in jurisdictions that prohibited collection agencies and those that allowed collection agencies. It was found that allowing collection agencies to use the court did not impact upon individual filing rates.[25] In other words, the presence of collection agencies did not have a "chilling effect" on individual plaintiffs bringing their claims in the Small Claims Court. Moreover, it was concluded that excluding collection agencies may

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[23] *1978 Study*, *supra*, note 14, at pp. 9 - 10.

[24] *1990 Study*, *supra*, note 6, at p.7.

[25] See Goerdt, "The People's Court: A Summary of Findings and Policy Implications from a Study in 12 Urban Small Claims Courts", *supra*, note 14, at pp. 41 - 42; and see Weller, Ruhnka and Martin, "American Small Claims Courts", *supra*, note 13, at p.10.

have more dangerous consequences as businesses would probably file their claims in the court of general jurisdiction, where it is unlikely that a defendant could proceed without a lawyer.[26]

In Quebec, the intent of the exclusion was to safeguard the "people's court" character of its Small Claims Court. The experience has been, however, that despite the exclusion of incorporated businesses, a significant percentage of cases are still brought by unincorporated businesses for the collection of debts. As a result, the court still has the image of a debt collection agency.

RECOMMENDATION

We recommend that businesses, such as collection agencies, should not be excluded from using the Small Claims Court.

Deputy Judges

In our *First Report* we asked whether Small Claims Court matters should be presided over by part-time Deputy Judges[27] or full-time provincially-appointed Judges. We noted that the funding implications of the latter option are significant for the provincial government, which makes this issue a difficult one to consider. While a full-time provincially appointed bench would likely be the best model of adjudication, the use of part-time Deputy Judges has been a valuable alternative.

The majority of lawyers who act as Deputy Judges bring extensive legal experience to the Small Claims Court -- usually more than 10 years at the Bar. Similarly, most are keenly interested in resolving the parties' dispute. The Review would like to recognize the valuable contribution these members of the legal profession make to the operation of the civil justice system.

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[26] Weller, Ruhnka and Martin, *id.*

[27] Deputy Judges are lawyers who are appointed for a 3 year renewable term to adjudicate small claims matters: see *Courts of Justice Act*, R.S.O. 1990, c.C.43, s.32.

a. Training

During our consultations we found that most users were generally satisfied with the Small Claims Court, including the adjudicators. There were, however, some criticisms concerning the use of part-time Deputy Judges because of a perceived inconsistency in decision-making.

While this criticism is based largely on anecdotal evidence, there is empirical evidence to support it. Professor Ramsay in his paper on Small Claims Courts reviewed a number of studies on Small Claims Court Judges. In describing these studies he states: "the striking conclusion from these studies is the diversity of judicial approaches in small claims courts"[28] and concludes that:[29]

> There appears to be a remarkable variability in approaches to adjudication by small claims court judges. Litigants will therefore experience different patterns of justice dependent on the particular approach of the judge. Since significant numbers of individuals are unrepresented there is little control over this discretion.

It is important that there be a standardized approach to the resolution of Small Claims Court matters. In our *First Report* we attributed this lack of standardization, in part, to the fact that Deputy Judges are in essence part-time "volunteers", leaving their law practices for usually one day a month to sit as a Small Claims Court Judge. This makes it difficult for them to have a continuity of experience as a judge and, without this continuity, it is difficult to ensure a consistent approach.

We also noted that this inconsistency in decision-making is due to the lack of training Deputy Judges receive with respect to their role as Small Claims Court Judges. We recommended that Deputy Judges receive mandatory training for the performance of their

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[28] *Ramsay, supra*, note 5, at p.36.

[29] *Id.*, at p.2.

duties. We continue to believe this is important and reiterate our recommendation.

We also learned of a perception that Deputy Judges are unsympathetic to consumer claims, which represent a significant number of Small Claims Court cases.[30] This perception may exist because most lawyers do not deal with either consumer claims or consumer legislation on a regular basis in their day-to-day practices. It is important that Deputy Judges possess the necessary knowledge to deal with all types of cases that arise in the Small Claims Court. Training can ensure they have this knowledge.

Concern has been expressed that requiring training for what is essentially a volunteer position will be too burdensome. While some lawyers may consider it to be a burden, we anticipate that most lawyers currently acting as Deputy Judges, as well as future candidates, will participate willingly in a mandatory training session.

RECOMMENDATION

Supplemental to Recommendation 48 in our *First Report*, we recommend that training of Deputy Judges include instruction in:

- **a standardized approach to the hearing and disposition of Small Claims Court matters;**
- **consumer claims including applicable legislation;**
- **poverty law issues; and**
- **case management.**

b. Appointment Process

The present system of appointing Deputy Judges has also received some criticism. Concern has been expressed that there is an inadequate screening of candidates to determine whether they have the necessary knowledge and skills to decide small claims cases.

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[30] *Id.*, at p.30.

At present, there is no advertisement of the position. Applications are made on the basis of the individual applicant's initiative and frequently on the basis of the recommendation of the local justice. Prospective candidates apply to the Regional Senior Justice of their region. If the Regional Senior Justice considers the person to be appropriate, he/she is recommended to the Attorney General. Subject to a satisfactory police file check, the appointment is usually confirmed. The process is informal and allows the Regional Senior Justice a flexible and quick method of securing deputy judge services.

In our view, however, it is important that a recruitment and appointment process be established which allows for the selection of the most suitable candidates from the widest number of eligible persons. Further, we believe that selection criteria should be established. At present, there are no prescribed standards or qualifications for appointment. Selection criteria are important to ensure that candidates possess the skills and attitudes necessary to deal with the types of claims which arise in the Small Claims Court. For instance, we believe it is important that candidates are comfortable in taking an active case management approach to the hearing of Small Claims Court cases. It is also important, in our view, that they are comfortable dealing with unrepresented parties.

RECOMMENDATION

We recommend that a formal recruitment process for Deputy Judges be established and that candidates be screened with regard to the following criteria:

- **membership in good standing of the Law Society of Upper Canada;**
- **a minimum number of years of legal experience;**
- **mediation experience;**
- **community service;**
- **professional reputation;**
- **an ability to take an active case management approach; and**
- **an ability to deal with unrepresented litigants.**

Access to Information

In our *First Report* we made several recommendations regarding access to information about the civil justice system.[31] We wish to reiterate our view that information should be readily available to the public in "plain language" and in a variety of mediums, languages and formats. At present, information on the Small Claims Court is only available in English and French in a brochure format. Recently, this information was made available on the Internet through the Ministry of the Attorney General's World Wide Web Site. Having understandable information about the Small Claims Court readily available throughout the province is an important component of ensuring access to justice.

RECOMMENDATION

We recommend that the "How to Make Small Claims Court Work for You" brochure be available in languages other than English and French.

We recommend that, in addition to providing information on the Internet, experiments be conducted in providing information on the Small Claims Court through interactive electronic kiosks in shopping malls, community centres, town halls and libraries.

Court Processing Standards

At present, there are no standards for the processing of small claims cases. Without standards, such as time to trial measures and limits on the number of adjournments, the public will not know what to expect in terms of how their case should proceed through the system. This lack of knowledge -- and corresponding uncertainty -- may deter some people from using the Small Claims Court. It is important that court processing standards for the disposition of small claims cases be established and that these standards be provided to parties at the time they file their claim or defence.

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[31] *First Report*, *supra*, note 3, at pp. 384 - 390.

Public Satisfaction

Similarly, there are currently no means to measure the public's level of satisfaction with the Small Claims Court. We do not know, other than from anecdotal evidence, whether the public is satisfied with the process and level of service. To inform future reform efforts, it is important to know whether the system is meeting the needs of the public. There should be a regular process for the users of the Small Claims Court to evaluate the system.

Policy Making

Policy issues relating to the operation and management of the Small Claims Court are generally the responsibility of the Small Claims Court Rules Subcommittee, which is composed of lawyers, judges and court administrators. At present, there are no para-legal or public representatives on this Committee. In order that policy issues relating to the Small Claims Court are decided in a responsive manner, it is important that there is input from all users of the court.

RECOMMENDATION

We recommend that a Working Group, which includes users of the Small Claims Court, be established by the Chief Justice and the Attorney General to make recommendations within 6 months of its creation with regard to:

- **court processing standards for the disposition of Small Claims Court cases;**
- **evaluation processes to measure public satisfaction with the processes in place; and**
- **appropriate membership on the Small Claims Court Rules Subcommittee.**

CHAPTER 6.2
CONSTRUCTION LIENS

In October 1992, the then Attorney General, Howard Hampton, formed an Advisory Committee on the Alternative Resolution of Construction Disputes. The Committee, which consisted of representatives from all major sectors of the construction industry, was asked to explore ways of preventing construction disputes and to consider alternative methods of dispute resolution.

In June of 1994, the Committee released a discussion paper entitled *To many disputes! Too much Litigation! Dispute Resolution Opportunities for the Construction Industry.*[1] Members of the Committee distributed the paper to their respective sectors, along with a questionnaire seeking input on the proposed recommendations. In view of the general support for the recommendations, no final report was issued.

While we do not propose to review all of the recommendations discussed in the paper, we would like to highlight the following which focus on alternatives to the court process and are of particular relevance to this Report. The Committee recommended:

- that the industry and construction lawyers should become familiar with alternatives to the court process, including mediation and arbitration;
- that alternative methods of dispute resolution be included in construction contracts;
- that the construction industry establish dispute resolution centres to inform and advise the industry about alternative dispute resolution and administer the resolution of disputes;
- that construction litigants should be required (by either legislation, rules of practice or Practice Direction) to participate in private mediation as early in the litigation process as practical;
- that the Law Society of Upper Canada establish a specialist designation in construction

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[1] Advisory Committee on the Alternative Resolution of Construction Disputes, *Too many disputes! Too much Litigation! Dispute Resolution Opportunities for the Construction Industry* (Province of Ontario, Ministry of the Attorney General: June 1994), at pp. 31 - 39.

law so that those in the construction industry can easily identify lawyers with expertise.

Further to the recommendations in our *First Report*,[2] a Working Group consisting of representatives of the Judiciary, the Masters, the Ministry, the Construction Bar and the construction industry met in December 1995 to review these recommendations and other matters related to construction litigation. While the Group generally supported the recommendations in the *Discussion Paper*, particularly those relating to ADR, it was felt that it would take time before ADR is used widely in the construction industry. The Group pointed to the need on the part of the various construction associations to educate their members about the ADR process. We were also apprised of concerns that there is an insufficient supply of qualified mediators and arbitrators in some parts of the province, particularly outside the larger urban centres. As well, it was noted that there is a sense that ADR is being used primarily for matters relating to contract interpretation, structural flaws and other technical items, with parties resorting to the court system for the resolution of lien matters. The Group pointed out that the case management process utilized by the Toronto Masters has proven to be very effective in resolving lien matters.

Since our *First Report*, the Review has also received a further submission from the Construction Law Section of the Canadian Bar Association - Ontario.[3] The submission recommends, among other things, the establishment of a specialized construction circuit court, with Masters or equivalent judicial officials resolving these disputes.

Based on this additional input, the following observations can be made:

- construction lien matters are factually and legally complex requiring specialized knowledge on the part of both adjudicators and members of the bar;

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[2] *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995), at p.306.

[3] *Final Submission to the Civil Justice Review: Canadian Bar Association - Ontario, Construction Law Section* (November 24, 1995).

- construction lien cases involve Ontario's second largest industry[4], and the expeditious resolution of these disputes is not only in the interest of the parties but of value to the provincial economy as well;

- the construction industry is making increased use of ADR to avoid and resolve disputes; nonetheless, many disputes by their nature will continue to require recourse to the courts;

- construction lien cases typically involve multiple parties and documents and lend themselves well to case management; section 60 of the *Construction Lien Act*[5], allows for settlement meetings which closely mirror our recommendations relating to settlement conferences for civil cases.

Having regard to the above, the Task Force makes the following recommendations.

RECOMMENDATION

We recommend that:

- **construction lien cases should be case managed;**

- **the timeframes contained in the *Construction Lien Act* and in the proposed civil case management rules should be aligned as far as possible to ensure compatibility; in this regard, we suggest that the Construction Law Section of the Canadian Bar Association - Ontario be asked to consider this matter and report to the Ministry of the Attorney General with an appropriate proposal;**

- **construction lien cases, like other civil cases, should be subject to mandatory referral to mediation after a defence has been filed;**

- **there should be a specialized list for construction lien cases to ensure that they are dealt with quickly by knowledgeable people;**

- **it should be left to the discretion of the Chief Justice who should be assigned to hear these matters (i.e. whether Judges, Masters, or Case Management Masters) and the practice may differ from place to place.**

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[4] See *Submission to the Civil Justice Review: Canadian Bar Association - Ontario, Construction Law Section* (July 20, 1994), at p.3.

[5] *Construction Lien Act*, R.S.O. 1990, c.C.30.

CHAPTER 6.3
LANDLORD AND TENANT MATTERS

Introduction

As discussed in our *First Report*[1], landlord and tenant matters are a specialized area governed by the *Landlord and Tenant Act*[2]. Pursuant to that Act, disputed applications must be resolved by a judge.

We noted in our *First Report* that landlord and tenant applications are placing significant pressure on the Ontario Court of Justice (General Division) as evidenced by the substantial increase in the number of applications filed since 1989/90[3], and by the fact that tenants are increasingly defending their positions, as they are entitled to do. We further noted that both landlords and tenants find the civil court process to be too lengthy and difficult to understand and that this has impaired access to the courts for the resolution of these disputes and resulted in an imbalance in the current system.[4]

Based on these observations, the Task Force recommended that a new forum, the logical one being an administrative tribunal, be considered for landlord and tenant disputes. At the time of writing the *First Report*, there were constitutional difficulties with this approach which did not permit its implementation in Ontario. This constitutional issue, however, was pending before the Supreme Court of Canada; accordingly, the Task Force recommended that "if the Supreme Court of Canada holds that it is constitutionally permissible to place landlord and

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1 *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995), c.17.2 [hereinafter "*First Report*"].

2 R.S.O. 1990, c.L.7.

3 Based on 1994/95 court statistics, there has been a 47% increase in applications filed since 1989/90: *Court Statistics Annual Report* (September, 1995).

4 See Julie Macfarlane, Project Coordinator, *The Landlord/Tenant Dispute Resolution Project: Final Report and Recommendations* (May, 1994), at pp. 61, 63 - 64 [hereinafter "*Macfarlane Study*"]. In the Macfarlane Study, the vast majority of cases in the sample were initiated by landlords, 95% of which were for arrears of rent; only 1% were actions brought by tenants.

tenant disputes in an administrative setting...such an option [should] be re-examined".[5]

In February, 1996, the Supreme Court of Canada released its decision in *Re Residential Tenancies Act (N.S.)*. The previous constitutional impediment to creating an administrative tribunal in Ontario to deal with landlord and tenant matters appears now to have been removed.[6]

Discussion of Administrative Tribunal Option for Ontario

In light of this recent Supreme Court of Canada decision, the Task Force makes the following recommendation.

RECOMMENDATION

We recommend that an administrative tribunal for the resolution of landlord and tenant disputes be implemented in Ontario.

Benefits of an Administrative Tribunal

In making this recommendation, we would like to revisit the benefits associated with creating an administrative process for landlord and tenant disputes briefly discussed in our *First Report*. In doing so, we would like to acknowledge the work that has been done in this area by the Fundamental Issues Group. We have reviewed with interest the comments and suggestions made by Professor Martha Jackman in her research paper with respect to the recommended transferral of landlord and tenant matters to an administrative agency.[7]

a. Increasing Accessibility: The Need for Less Formal Procedure

Accessibility to the justice system is one of the criteria against which the modern civil

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[5] *First Report*, *supra*, note 1, at p.302.

[6] *Re Residential Tenancies Act, (N.S.)*, [1996] 1 S.C.R. 186.

[7] Martha Jackman, *The Reallocation of Disputes from Courts to Administrative Agencies* (July 13, 1995) [hereinafter "*Jackman*"].

justice system must be judged. It is vitally important, therefore, that the civil justice system provide the public with access to a forum where they can have their landlord and tenant disputes resolved quickly and economically.

According to the *Macfarlane Study*, both landlords and tenants find the current statutory procedure to be highly legalistic, dauntingly complex and unreasonably slow.[8] However, in particular, tenants find the civil justice system to be inaccessible: in the *Macfarlane Study*, only 1% of applications were brought by tenants; and tenants complained of the intimidating formality and incomprehensibility of the court process.[9]

An important benefit of an administrative tribunal is that, within the limits imposed by the *Statutory Powers Procedure Act*[10], it can adopt simplified and informal procedures that are tailored to reflect the unique characteristics of landlord and tenant disputes.[11] We are of the view that the regular court system has proven too formal and cumbersome in structure, and that such disputes could better be dealt with by a more informal, summary proceeding before a tribunal where the parties would feel less inhibited in presenting their case.

b. Reallocation to a more appropriate Forum

As previously discussed, landlord and tenant applications are placing significant pressure on an already over-burdened court system, and 95% of these applications are for relatively straightforward applications for arrears of rent. In our *First Report*, we emphasized the importance of "fitting the forum to the fuss". We stated that the forum should be appropriate to the nature and complexity of the dispute and that smaller and less complicated disputes did not require the full range of procedural rights which dominate the superior court process.

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[8] *Macfarlane Study*, *supra*, note 4, at pp. 3 and 68 - 80.

[9] *Id.*, at pp. 4 and 80.

[10] R.S.O. 1990, c.S.22.

[11] *Jackman*, *supra*, note 7, at pp. 47 - 48.

The very large majority of landlord and tenant applications are generally not of a complex legal nature and, in our view, do not require to be heard by a judge of the General Division. Indeed, we suggest that they can be dealt with as effectively and more expeditiously through a specialized and less formal administrative process.[12]

c. Early Resolution of Disputes

The creation of an administrative process provides the opportunity to resolve landlord and tenant disputes quickly outside of a formal adjudicative process. The functional flexibility of an administrative process allows it to be structured to provide the most expeditious resolution of those disputes.

For example, as is the case in Nova Scotia, mediation could be included as an important component in the administrative process. The *Macfarlane Study*, in recommending that a mediation process be introduced to landlord and tenant disputes, found that over 85% of landlord and tenants interviewed felt that mediation could have resolved their case as effectively as the court process.[13] As noted by Macfarlane, mediation encourages the improvement and maintenance of a continuing relationship, which the parties often have in a landlord and tenant matter, and allows for a quick resolution of the dispute in a consensual and realistic way.[14]

Characteristics of an Effective Administrative Process

In our *First Report*, we stated that, in order for the public to have a feeling of confidence in the integrity of their civil justice system, they are entitled to:

- timely and affordable civil justice
- be able to understand the system which provides that justice, and,

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[12] *Macfarlane Study*, *supra*, note 4, at pp. 46 and 83 - 84.

[13] *Id.*, at p.198.

[14] *Id.*, at p.143. See, also, *Jackman*, *supra*, note 7, at pp. 41 - 49.

- basic, straightforward information to assist it when it comes into contact with the system

In addition, we recommended a civil justice system where cases are actively managed, and where appropriate alternative dispute resolution mechanisms are actively employed. In an earlier Chapter in this Report (see Chapter 5.2), we recommended that an early mandatory mediation process be implemented for civil disputes.

In our view, these considerations are equally applicable to an effective administrative process for the resolution of landlord and tenant disputes and should be borne in mind in the design of such a system.

As well, in designing an effective administrative process, it is important to take into account concerns that have been expressed about conferring responsibility for the resolution of landlord and tenant disputes to such a forum.[15] It has been noted, for example, that unless guarded against, administrative procedures can become overly formalized and complex to the extent that they unnecessarily replicate the formality of the court process.[16]

Concerns have also been expressed that, if an administrative process is not properly funded with adequate staffing levels, problems with delays and backlogs will become endemic and severely curtail the effectiveness of this forum.[17]

Other concerns are that, if safeguards are not in place to ensure that its decision-makers are independent, impartial and of the highest quality, the perception will arise that the administrative forum dispenses "second class justice", with the result that the system will lose

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[15] See, generally, *Jackman*, *supra*, note 7, at pp. 50 - 56.

[16] *Id.*, at p.53.

[17] *Id.*, at pp. 55 - 56.

all credibility.[18]

We share these concerns and acknowledge the importance of addressing them in the design of an effective administrative process.

RECOMMENDATION

While the Task Force is not in a position to recommend the exact nature and form of an administrative process, we recommend that it should include the following characteristics:

- **it should be a single process before an independent tribunal with exclusive jurisdiction of first instance;**
- **there should be a right of appeal to a single judge of the Divisional Court on questions of fact and law, with no automatic stay pending appeal;**
- **the tribunal should actively manage cases, rather than simply adjudicate, with the objective of ensuring the most expeditious and effective resolution of the dispute; in this regard, an early mediation process should be an important component;**
- **the tribunal should enhance public access by ensuring that its procedures are simple, easily understood, and responsive to the unique characteristics of such disputes and that information about its procedures are clearly and broadly communicated;**
- **the tribunal should be adequately staffed; adjudicators should be broadly representative of the Ontario public, properly trained, with demonstrated expertise and understanding of the unique issues in this area; similarly, its administration must be staffed by qualified and trained personnel at all levels;**
- **the tribunal must be properly and adequately funded from the outset to ensure its credibility and integrity and to guard against the crippling consequences of operating in a backlog environment.**

Current Situation in Ontario

The Task Force understands that, in light of the recent Supreme Court of Canada decision, the government of Ontario is actively considering the option of creating a provincial

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[18] *Id.*

tribunal to deal with landlord and tenant matters. A discussion paper was recently released by the Ministry of Municipal Affairs and Housing inviting comments on an appropriate dispute resolution system.[19] It is noted in the paper that the government "is proposing to create a new dispute-resolution system independent of the courts to adjudicate both rent control matters and other landlord and tenant matters".[20] The exact nature of the model will be finalized after a period of consultation. Issues for consideration in the paper include the following: the relationship between the dispute resolution system and government; the appointment of adjudicators; the dispute resolution process, including the use of mediation; and rights of appeal.

For the reasons discussed earlier in this Chapter, we support the government's direction in this regard and commend for its consideration our recommendations set out above.

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[19] Province of Ontario, Ministry of Municipal Affairs and Housing, *Tenant Protection Legislation: New Directions for discussion* (June 25, 1996).

[20] *Id.*, at p.7.

CHAPTER 6.4
ENFORCEMENT

Introduction

In our *First Report*, we said that recommendations relating to enforcement activities would be deferred to our Final Report, and invited further comment on these issues -- in particular the following:[1]

- the appropriateness of existing enforcement mechanisms -- in particular, the use of warrants of committal in Small Claims Court;
- the level of service provided by the courts and the degree to which the public is well served;
- the requirements of service and options to personal service in particular; and
- the extent to which enforcement and process serving services should be provided by the courts.

Appropriateness of Existing Enforcement Mechanisms - Warrants of Committal

The Small Claims Court is the only civil court where such a drastic remedy as a warrant of committal can be readily obtained. The current procedures dealing with warrants of committal lead to the perception that the warrant is issued for the non-payment of the judgment debt, as opposed to contempt of court for not appearing at a judgment debtor examination for non-payment.

Some changes have been proposed to the Small Claims Court Rules[2] by the Small Claims Court Subcommittee of the Rules Committee to address this perception. First, the Subcommittee has recommended that the warrant should not be issued until after the second hearing at which the debtor fails to appear, or where the debtor has been uncooperative at the

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1 *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995), at p.254 [hereinafter "*First Report*"].

2 Small Claims Court Rules, R.R.O. 1990, Reg. 201.

judgment debtor examination, to ensure that it is used in the minimum number of circumstances. Currently, it can be issued after the first hearing -- the judgment debtor examination -- although it is not usually enforced until after a second hearing -- the committal hearing. It is further proposed that the second hearing be renamed the "contempt hearing", as opposed to the "committal hearing", to clarify that the person is being found in contempt of court for failure to attend the examination.

Second, pursuant to the proposed rules change, the court would only be empowered to make a commital order at the contempt hearing. At present, the court can make such an order after the debtor fails to attend the judgment debtor examination and the clerk can then issue a warrant. This has led to the perception that the warrant is for the non-payment of the judgment debt rather than the contempt arising out of a failure to attend the hearing, as we have noted.

Third, under the proposed rule changes, the notice of contempt hearing must be served personally. At present, service by mail is permitted, despite the fact that the next step in the process is the enforcement of the warrant.

While these changes will help address the perception, it is not likely that they will eliminate it. As long as imprisonment is a possible sanction for contempt, and the contempt has some connection to a money judgment, it is likely that this perception will continue. Further, these changes do not address the larger issue of whether imprisonment for contempt is appropriate in this context.

We do not believe it is. In our view, such a sanction is tantamount to imprisonment for debt. The Task Force recommends that less draconian options, such as a civil fine, be considered for enforcing such contempt orders.

RECOMMENDATION

We recommend that imprisonment as a sanction for contempt of court in the Small

Claims Court, where the contempt relates to the non-payment of a judgment debt, be reconsidered with a view to imposing a less intrusive sanction.

The Requirements of Service and Options to Personal Service

On April 1, 1996, the Ministry of the Attorney General terminated personal service of court documents by Ministry personnel. At the same time, the Small Claims Court Rules were amended to eliminate the requirement of personal service of claims by the bailiff and to permit service by ordinary mail.

Notwithstanding these changes, there continues to be varying, and sometimes conflicting, rules with respect to the service of court documents. The underlying rationale for the particular service rule is not always apparent -- for example, why service in certain cases must be by registered mail as opposed to ordinary mail. Further, the rules do not address more modern methods of service, such as by courier and E-Mail. In some cases, these alternate methods of service would be as effective in giving notice to an opposing party and would result in lower costs to litigants and the justice system. Accordingly, we make the following recommendation.

RECOMMENDATION

We recommend that the Ministry of the Attorney General undertake a comprehensive review of all service rules with the objective of ensuring consistency in service requirements and optimizing the use of modern, effective and low-cost methods of service.

The Enforcement of Judgment Debts

a. Process

The civil justice system provides the process by which individuals can enforce their judgments and obtain payment of monies they are owed. Confidence in the civil justice system will only exist if this process can produce the results that judgment creditors are entitled to -- payment of their debt in a simple and efficient way. At present, that confidence is threatened. The process is difficult and frustrating and the outcomes, often because of the process, are not

satisfactory

The problems with the enforcement system are fundamental in nature. A review of the legislative framework and the actual procedures followed in the courts discloses the following:

- a lack of consistency among the various courts with regard to the enforcement processes available; and
- legislation which is often ambiguous, unnecessarily complex (due in part to the number of applicable statutes) and archaic.

The lack of consistency manifests itself at the level of the user of the system in several ways. In the first place, the process a judgment creditor must use to enforce a money judgment differs depending upon the particular court which issues the judgment.[3] Secondly, the cost of enforcement varies between different branches of the Ontario Court of Justice (General Division). Finally, the level of service provided to judgment creditors in the different levels of courts differs to a noticeable degree.

The following example illustrates this disparity. Two judgment creditors seek to enforce their judgments through a garnishment order: one has a Small Claims Court judgment, the other a judgment from the General Division. The person with the Small Claims Court judgment will be given the appropriate forms from the court office; court staff will provide the required information necessary to fill out the forms; booklets are available free of charge to explain the process and the options available; and court staff can assist by outlining the enforcement remedies available. The creditor is generally able to complete the process without the aid of a lawyer. The person with the General Division judgment, however, is not provided with any of the several required forms to fill out; no assistance is given with respect to identifying the forms or providing the information required to complete the forms; and no

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[3] There are four courts which can issue a money judgment: the Ontario Court of Justice (General Division); the Small Claims Court, which is a branch of the General Division; the Ontario Court of Justice (Provincial Division) when it has jurisdiction in a claim for support; and the Unified Family Court, which is also a branch of the General Division.

information is given regarding what other remedies are available. The person usually seeks the assistance of a lawyer. When it comes time to issue, file and serve the process, the person with the Small Claims Court judgment pays a fee of $35 to issue and file the Notice of Garnishment and $3.60 to serve it by mail. In the General Division, the person pays $89 to issue and file the notice and it is their responsibility to serve the debtor with the notice.

It is not readily apparent to us why, in principle, these inconsistencies should exist. It can be argued that the difference in processes is justified based on the different history, purpose and clientele of the courts. The Small Claims Court, for instance, is intended to provide a forum where the public can resolve (and enforce) disputes themselves, without legal assistance, for cases under $6,000 in a low cost, simple, user-friendly environment. This has led to a customer focus in developing the processes for the Small Claims Court. The General Division, on the other hand, is the court of general jurisdiction: it is the forum for the resolution of all disputes. Perhaps the processes should be different; this is not to say, however, that the process in the General Division should not be as user friendly as possible. This issue is important, and needs to be addressed.

b. Legislation

In the early 1980's, the Ontario Law Reform Commission in its *Report on the Enforcement of Judgment Debts and Related Matters* described the existing debtor-creditor law as "fragmented, ambiguous, incomplete and archaic".[4] The Commission stated as follows:[5]

> Developing in a generally *ad hoc* and unsystematic fashion, the law often has left debtors, creditors, their advisors and enforcement personnel in some confusion concerning the administration of the enforcement system as a whole and concerning the existence and effectiveness of statutory rights.

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[4] Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters*, Parts I to V (Ministry of the Attorney General, 1981 and 1983) Part I, at p.3 [hereinafter "*O.L.R.C. Report*"].

[5] *Id.*, Part I, at p.77.

Perhaps the best description of the present state of the law is that made by the Alberta Law Reform Institute in its 1991 Report:[6]

> One of the chief criticisms of the present system is that it is a hodgepodge of statutory and judicial rules and procedures. As the law has developed in this area, the logical ordering of the provisions has not been given a high priority. The system is far from user-friendly. One of our objectives has been to recommend an enforcement system that is coherent, logical and internally consistent.
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> The system should be established by one piece of legislation that is logically arranged and describes enforcement processes in a manner that can be understood by people who are affected by it and not just by their lawyers.

This pronouncement is equally applicable to the present state of the law in Ontario. In our view, Ontario's enforcement system should also be based on one piece of legislation governing all enforcement processes that is "logically arranged and describes enforcement processes in a manner that can be understood by people who are affected by it".[7]

c. Other Reform Proposals

The complexity of this area of the law, and the extent of reform believed necessary, is illustrated by the breadth of the *Ontario Law Reform Commission (O.L.R.C.) Report* which contains some 450 recommendations. Several other jurisdictions, including Alberta (where reforms were implemented in January 1996), New Brunswick and Newfoundland have recommended reforms based, in part, on the findings and recommendations of the *O.L.R.C. Report*.

In all three provincial jurisdictions, the recommended reforms include statutory and regulatory reform, as well as operational. These jurisdictions have been guided in their reform proposals by the following principles:

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[6] Alberta Law Reform Institute, *Enforcement of Money Judgments*, Vols. 1 and 2 (Report No. 61, March 1991) Vol. 1, at p.26 [hereinafter "*Alberta Report*"].

[7] *Id.*

- that the system of enforcement operate under creditor initiation and control;
- that it be designed to require minimal involvement by the court, which will maintain a supervisory role; and
- that enforcement be primarily an administrative procedure conducted through an enforcement office on instructions from the creditor.

These principles should be considered in any reform of the enforcement system undertaken in the province of Ontario.

With respect to statutory and regulatory reform, these jurisdictions have recommended the implementation of a single "Judgment Enforcement Act", which would constitute a complete code of all pre- and post- judgment enforcement procedures, and replace the many pieces of legislation now applicable. Alberta's new *Civil Enforcement Act*[8] was proclaimed in force in January 1996. Both New Brunswick and Newfoundland are actively considering comprehensive judgment enforcement legislation. As noted earlier, the *O.L.R.C. Report* also proposed a "coordinated enforcement system, integrating virtually all enforcement measures under a single new statutory regime."[9]

Each of the three provincial jurisdictions also support reforms to the structure and organization of their enforcement systems in order to improve service delivery. For instance, both New Brunswick and Newfoundland have proposed a new restructured Enforcement Office which would be responsible for the co-ordination and general operation of a new enforcement system. Both of the proposed regimes would rely on a new computerized province-wide Enforcement Registry. Once a Notice of Judgment has been registered in the Enforcement Registry, all of the debtor's personal property would be bound; a judgment creditor would no longer have to file a writ in each judicial district where the debtor has personal property. The

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[8] *Civil Enforcement Act*, S.A. 1994, c.C-10.5.

[9] *O.L.R.C. Report*, *supra*, note 4, Part I, at p.77.

O.L.R.C. Report also recommends the creation of an integrated enforcement office which would be supervised by the sheriff, and responsible for virtually all enforcement measures in respect of *all* judgments from *all* court levels in Ontario."[10] (Emphasis added.)

Under the new Alberta *Civil Enforcement Act*, the Sheriff's Office no longer acts as a registry for writs. Instead, the Personal Property Registry, which is also the registry for creditors with secured interests, is used as a central province-wide enforcement registry for all enforcement mechanisms. Registration of a writ by an unsecured judgment creditor in the Registry is effective on a province-wide basis. In order to bind the debtor's land, the writ must also be registered at Land Titles.

Alberta, however, has gone further in its organizational and structural reforms. With the proclamation of the *Civil Enforcement Act*, a form of enforcement agencies' model for the seizure activity done by the Sheriff's Office has been implemented. Prior to its enactment, seizures were carried out by bailiffs acting under contract with the Sheriff's Office. As well, the Sheriff's Office no longer serves government documents and service of documents is still unregulated.[11]

Under the *Civil Enforcement Act*, creditors can no longer obtain a court order to conduct a private seizure. Instead, only government-approved civil enforcement agencies that have satisfied insurance, bonding and training requirements are allowed to conduct seizures, pursuant to a contract entered into with the Sheriff's Office. As well, the bailiffs employed by these Agencies must satisfy training and other requirements. The Sheriff's Office is responsible for reviewing the conduct of civil enforcement agencies to ensure that the integrity of the justice system is not compromised.

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[10] *Id.*, Part I, pp. 3, 77 and 171.

[11] Service of documents for the private sector had already been discontinued.

It is worth noting that, in addition to conducting seizures, civil enforcement agencies in Alberta also have the authority to repossess property under a lease. While we have some concerns that eviction orders may be more properly enforced by officers of the court, perhaps consideration should be given to whether Alberta's system, where an enforcement agencies model is balanced with a level of regulatory control, might be appropriate.

There are several rationale for this "outsourcing" of seizure activity. It is suggested that the Alberta model will improve efficiencies within the system and serve the public better by allowing value-added services and eliminating duplication. Further, it is expected to reduce costs to government as it is assumed that the revenue sharing arrangements with the civil enforcement agencies will generate sufficient revenues to cover the direct costs of regulating the activity. Finally, it provides business opportunities for the private sector.

d. Privatization of Enforcement Services

In our *First Report* we suggested that government should not be providing services that may be readily available elsewhere.[12] In keeping with this reasoning, the Review believes that other options for the delivery of enforcement services may be appropriate. The above rationale for the Alberta model supports this view.

It is important, however, that any new model of delivering enforcement services must include a locus of responsibility and clear lines of accountability. This is necessary so that the users know who the authority is behind the enforcement process. As seizure activity can lead to circumstances which threaten the public peace, the system must protect against potential abuse. Accordingly, it is our view that, if responsibility for enforcement services are privatized, there must be sufficient regulatory control to ensure that the integrity of the justice system is not compromised.

The Alberta model appears to balance the benefits of reducing costs to government with

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[12] *First Report*, *supra*, note 1, at p.254.

an adequate level of regulation to meet these concerns. While the seizure (and eviction) activities are outsourced to enforcement agencies under a government contract, the government maintains a supervisory role by screening the agencies to ensure they meet the necessary insurance, bonding and training requirements and by an ongoing review of their activities.

e. Recommendations

The inconsistencies, inefficiencies and ambiguities in the present system impact on all those who come into contact with it. Effective enforcement procedures are important not only to users of the civil justice system but also to society as a whole. If not addressed, the problems which plague the current system of enforcement will eventually impact on the public's confidence in the civil justice system. It is essential that this be prevented. It is for this reason that we believe it is time to revisit the issue of enforcement and to take action on the recommendations made in the *O.L.R.C. Report*.

RECOMMENDATION

We recommend that the Ministry of the Attorney General review the Ontario Law Reform Commission's *Report on the Enforcement of Judgment Debts and Related Matters* with a view to recommending the implementation of those reforms considered appropriate within 6 to 9 months.

In its review, the Ministry should have regard to reform initiatives in Alberta, New Brunswick and Newfoundland and should give consideration to:

- **proposing new legislation to establish a reorganized, comprehensive and coordinated enforcement system for the enforcement of judgment debts, integrating virtually all enforcement measures under a single statutory regime;**
- **establishing a new central enforcement office under the supervision and control of a court official;**
- **proposing uniform statutory and regulatory provisions and operational practices to govern the enforcement of money judgments from every court level; and**

- **designing a system which identifies the body which is responsible and accountable and includes sufficient safeguards and regulatory controls to protect against abuses.**

The Ministry should be guided in its review by the following set of principles articulated by the Alberta Law Reform Institute:[13]

1. **Universal Eligibility: All the debtor's property should be subject to enforcement except property that is deliberately exempted;**

2. **Just Exemptions: Deliberately exempted property should be sufficient to permit debtors to maintain themselves and their dependents with the necessaries of life;**

3. **Creditor Initiative: The enforcement process should be creditor-driven, rather than being dependent on the initiative of a government official;**

4. **One Statute: The enforcement process should be governed by one statute that describes the system of enforcement and its various processes in a consistent, coherent and logically ordered way;**

5. **Judicial Supervision: Judicial supervision should be kept to a minimum, but parties should have easy access to the court when they require it; and**

6. **Imprisonment for Debt: Imprisonment should not be, or seen to be, a remedy for the enforcement of money judgments.**

The Ministry should consult with those with expertise in this area, including consumer groups, collection agencies, the Bench, the Bar, Courts Administration, and the private sector.

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[13] *Alberta Report, supra,* note 6, at p.403.

CHAPTER 6.5
DISCOVERIES

Introduction

One of the issues deferred to our *Supplemental and Final Report* was that of the discovery process. As discussed in the *First Report*, the stage of a lawsuit between the delivery of the pleadings and the pre-trial or settlement conference is commonly referred to as the "discovery phase" of litigation. During this phase, the parties have an opportunity to learn more about each other's case through the mandatory disclosure of relevant documents and the pre-trial examination under oath of parties adverse in interest. The primary goal of the discovery process is to ensure open and full disclosure in order to facilitate settlement efforts and to make the trial process more effective and fair.

While the oral examination part of the discovery process is considered by the Bar and others to be a critical component in the conduct of litigation, concerns have been raised that it has become too time-consuming and costly to continue without new controls. During the consultation phase of the Review, the length and cost of discoveries were concerns raised in every centre we visited. We heard many accounts of the growing length of oral examinations and serious doubts were expressed about their value relative to what was at issue in the litigation.

In the *First Report*, the Review noted that the cost of discovery to each litigant who participates in an average 3-day trial is approximately $7,000 in legal fees.[1] This calculation was based on a two day examination for discovery, including preparation time and documentary disclosure. It did not include, however, the costs associated with discovery-related motions that are often brought. While there is no reliable data on the percentage of such motions, we noted in our *First Report* that Toronto Masters estimate that 25% of all motions brought before them involve discovery issues.[2] As well, there are other costs

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[1] *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995), at p.235.

[2] *Id.*, at p.234.

involved -- for example, in responding to undertakings, reporting to clients, and purchasing and reviewing transcripts of discovery evidence.

We also noted in the *First Report* that a significant contributing factor to the growing length of examinations, and the corresponding increase in cost, is the current broad scope of pre-trial discovery. When the Rules of Practice were amended in 1985, a primary focus of the revisions was to broaden the scope of examinations for discovery by allowing a much wider range of questioning and cross-examination. In addition, as a result of the growth in technology, there has been a marked increase in information sources and available data which in turn has lead to a substantial increase in the material available for discovery purposes.

We have concluded that it is becoming increasingly difficult to cope economically with the present scope and form of discovery and, accordingly, made the following recommendation, namely:[3]

> **That consideration be given, by the Rules Working Group of the Implementation Team, to methods of improving the examination for discovery process in ways that will make it more economically effective while at the same time preserving its essential disclosure principles. Some areas to be considered in this exercise are:**
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> - **The possible re-entrenchment of the scope of discovery to pre-1985 limits**
> - **Removal of the right to cross-examine at discovery**
> - **Time parameters for the conduct of oral examinations**

We also invited comments, pending our final Report, on other possible measures for streamlining the discovery process.

The Need for Further Study

Since the release of the *First Report*, the General Division has initiated a four-year pilot

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[3] *Id.*, at p.238.

project pursuant to which Simplified Rules will be applicable to claims under $25,000. The pilot project took effect on a province-wide basis on March 11, 1996. A key feature of the new simplified rules is the elimination of examinations for discovery for claims under $25,000.

Concerns about discovery are still relevant, however, to those cases that do not fall within the Simplified Rules initiative. While the proposed Working Group was not constituted, the Task Force did invite the Honourable S.G.M. Grange, a retired Justice of the Ontario Court of Appeal, to consider this issue, and he has provided the Review with his preliminary observations. For instance, he observed:[4]

> The *First Report* expresses the widespread concern of the Bar and others that it [discovery] is now out of hand, that it adds unnecessary delay and cost to the process and thus hinders rather than helps the resolution of the dispute. The process takes time and effort to arrange, to conduct and to evaluate. Not only the time expended is costly but the process itself costs money. The disbursements and the motions relating to Discovery can add immeasurably to the costs of the litigation. It is very doubtful that the money is always or even generally well spent. Some way must be found to make Discovery worth that expense or at least to discourage the present trend to excessive use and unnecessary expense. In the Court of Appeal it was put in *Ontario v. Stavro*, 26 O.R.(3d) at p.48:
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> > The discovery process must also be kept within reasonable bounds. Lengthy, some might say interminable, discoveries are far from rare in the present litigation environment. We are told that discovery of these defendants has already occupied some 18 days and is not yet complete. Unless production from and discovery of non-parties is subject to firm controls and recognized as the exception rather than the rule, the discovery process, like Topsy, will just grow and grow. The effective and efficient resolution of civil lawsuits is not served if the discovery process takes on dimensions more akin to a public inquiry than a specific lawsuit.

Among other things, Mr. Grange has suggested that a modified version of elective discoveries be considered, with a series of checks and balances to ensure fairness and the fullest of disclosure where necessary, but not necessarily the fullest of disclosure if

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[4] Report from the Honourable S.G.M. Grange to the Honourable Mr. Justice Robert A. Blair (July 16, 1996), at p.2.

unwarranted in the circumstances.

We have also received a number of other suggestions for addressing the problems associated with the discovery process. For example, it has been proposed that the scope and length of discovery should be controlled through the case management process, whereby a Case Management Master or Judge would set parameters around the oral discovery process at a case conference. We agree that the case management process is an important vehicle for streamlining the discovery process. Other proposals include having in place informal processes, such as teleconferencing, for dealing expeditiously with discovery-related issues.

The Canadian Bar Association's Systems of Civil Justice Task Force also acknowledged the problems with the current oral discovery process and recommended that Canadian jurisdictions consider specific reform measures directed at imposing limits on discovery. Examples of such reform measures include limiting discovery through strict timelines or limits on the number of examinations, mandatory discovery conferences between counsel and/or before a judge, and using sanctions to penalize duplicative or cumulative discovery.[5]

All of these suggestions are worthy of further consideration and point to the need for a more indepth study of this issue. There is a need to consider not only options for limiting the current discovery process, but more fundamentally to consider whether the rules governing this process should be amended, for example, to restrict the current scope of discovery. Accordingly, the Task Force makes the following recommendation.

RECOMMENDATION

We recommend that the Civil Rules Committee constitute a Working Group to consider and make recommendations concerning the current Rules of Civil Procedure governing the discovery process with the objectives of preserving its essential disclosure principles while improving its economic effectiveness.

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[5] *Systems of Civil Justice Task Force Report* (The Canadian Bar Association, August 1996), at p. 43.

CHAPTER 7
FAMILY LAW

Introduction

In our *First Report*, we proposed a "resolution focused process" for family law to address the many concerns we heard during the consultation stage of the Review with respect to family law proceedings.[1] Key components of the proposed new process include:

- *early education in schools, combined with community-based information services*, designed to inform members of the public about their rights and responsibilities in relationships and their responsibilities towards their children, and to provide resource information about the types of circumstances in which relationships break down;
- *an information video respecting family law matters,* prepared for distribution through community resource centres, shelters, legal aid clinics, the courts and law offices; and *mandatory viewing (except in emergencies)* of that video by parties contemplating family law litigation prior to the institution of any court proceedings;
- *alternative dispute resolution (ADR) techniques*, to be considered before the commencement of a family law proceeding;
- *an early evaluation session involving the early intervention of judges, preferably before the return of a first motion*;
- *a streamlined process and case management regime* for all family law matters in all courts;
- *local and regional family law committees*, to be established, with representatives from the Public, the Judiciary, Courts Administration and the Bar, to enhance communication, knowledge, and the quality of the process in family law matters; and a parallel provincial committee to assist in providing a communication and co-ordination function across the province;
- *legal education programs for lawyers who provide family law services*, to be developed by the Legal Aid Plan in co-operation with the Law Society of Upper Canada and other professional organizations, with a view to requiring participation in such programs, or some other such form of accreditation, as a condition of the issuance of legal aid certificates in such matters; and,
- *a low-cost administrative option for the disposition of uncontested divorces (excluding issues respecting children) free of judicial involvement.*

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[1] *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995), at pp. 275 - 283 [hereinafter "*First Report*"].

The Family Law Working Group

As noted in Chapter 4, dealing with matters of implementation, a Family Law Working Group has been constituted since the release of the *First Report* for the purpose of developing and implementing the Review's proposed "resolution focused" family law process. The Working Group is chaired by Regional Senior Justice B.T. Granger, and assisted by Ms. Debra Paulseth, the Ministry's Regional Director for Toronto Region.[2]

The composition of the Working Group is widely diverse and representative on a province-wide basis. There are 15 members. Two are General Division Justices; one is a Family Division Justice; two are Provincial Division Judges; six are members of the Bar (three from outside of Toronto); one is a Public representative; another a law professor; and three are Ministry representatives.

At its first meeting in early Fall 1995, the Working Group divided its tasks by subcommittee, formed for the purposes of:

- establishing regional and local family law committees;
- creating an information services plan;
- developing a simpler process for uncontested divorces;
- proposing one set of family case management rules for the province;
- developing proposals for improving the curricula for schools and the Bar Admission Course, and to set standards for obtaining Legal Aid certificates; and
- developing specific suggestions to save litigants costs and to recommend ways in which the use of "costs" as a deterrent to frivolous steps might be introduced.

The full group has met on three occasions altogether, on each occasion for two days, and at least one further meeting is planned. Significant progress has been made in developing suggestions for building upon the initial recommendations of the Civil Justice Review and putting into place various of the "key components" to the new resolution focused process,

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[2] Ms. Paulseth was formerly Counsel to the Civil Justice Review during its *First Report* phase.

outlined above. A summary of the Working Group's proposals which the Civil Justice Review endorses is set out below.

a. Case Management

In terms of a province-wide approach to case management timeframes in family matters, the Working Group supports the adoption for family law cases of the timetable recommended by the Civil Case Management Working Group for standard track civil cases,[3] subject to the statutory exceptions set out in the *Children's Law Reform Act*[4] and the *Child and Family Services Act*.[5] It is unanimously of the view that no local or regional timetables should be prescribed.

Further, the Working Group agrees with the Review's earlier recommendation[6] that a mandatory case conference in family matters take place *before* interim relief is sought, subject to emergency applications, and that individual timelines be established at such conference by the case management judge. The first case conference would feature:

- compulsory attendance of the parties;
- completion of memoranda of agreements and identification of outstanding issues;
- establishment of individual timelines where appropriate;
- scheduling of all future events; and
- consideration of referral to ADR.

While the Group is unanimous that the expansion of case management is dependent on adequate systems' support and competent trained staff, no unanimity has been reached regarding the potential role of Case Management Masters in family law proceedings.

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[3] See *supra*, Chapter 5.1.

[4] R.S.O. 1990, c.C.12.

[5] R.S.O. 1990, c.C.11.

[6] See *First Report*, *supra*, note 1, at p.277.

b. Family Law Committees

The Working Group has pursued the Review's recommendation that local and regional family law committees be established. Through correspondence with the Regional Senior Justices and Judges and the County and District Law Presidents' Association, a comprehensive database of all existing Family Law Committees has been created by the Working Group. The Group has also encouraged the creation of these committees for each local family court. Over the past year, in Metro Toronto, three Family Bench and Bar Committees were created, in addition to the two existing committees. On June 20th 1996, the first regional meeting of all five committees was held.

To assist with ongoing communications between the different family committees, the Working Group recommends that a Web Site for Family Law Committees be established.

c. Streamlined Processes

As it would appear there are constitutional impediments to granting uncontested divorces using a purely administrative mechanism, the Working Group is considering other options for streamlining this process and making it more accessible and less costly. The Working Group believes that the total court fees in relation to an uncontested divorce are excessive and has noted the discrepancy in the fee structure between the General Division and the Family Court. It suggests that the current tariffs be amended to eliminate the fee for "setting down" uncontested divorces and that, to ensure consistency, the tariff for both courts be set at $150.

The development of standard, simplified court documents, including a standard form of affidavit, recommended in the *First Report*[7], was deferred by the Working Group in light of the work undertaken in this regard by the Family Rules Committee. The Rules Committee is in the process of finalizing a set of uniform family rules which will be released this Fall.

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[7] *Id.*

d. Information Services

North American research considered by the Working Group supports the Review's recommendation that the viewing of an information video dealing with family law matters be a mandatory pre-condition to entering the family law court process, with an exception for emergency applications. An approved outline for the video has been prepared. The Working Group has recommended that the viewing of the video be accompanied by verbal presentations from both legal and mental health professionals.

An index of family law information pamphlets and other relevant materials has also been prepared, together with the names of suppliers and corresponding cost, which has been forwarded to all Family Law Committees in the province.

e. Expansion of the Family Court

The Unified Family Court in Ontario was expanded in the Spring of 1995 from one to five courts. This branch of the General Division is now located in Hamilton, London, Barrie, Kingston and Napanee, as previously noted. The Family Law Group urges the continued expansion of the Unified Family Court across the Province.

f. Mediation

The primary focus of the Working Group has been on early intervention in family law cases through mandatory information services. The Group has not reached a consensus regarding the concept of mandatory referral to mediation in the family law area, although it has agreed that mediation services currently provided in the expanded Family Courts should be generally available.

The Civil Justice Review supports the availability of mediation and other forms of alternate dispute resolution for family law matters. In this regard, it is important to note the extent to which ADR is currently used in family law disputes and the fact that many of these techniques were pioneered in this area. The issue of ADR and Family Law is discussed in greater detail in Chapter 5.2 of this *Supplemental and Final Report*.

g. Legal Aid

Legal Aid for family law matters has changed dramatically since the release of the *First Report*. Three years ago, 61,704 certificates were issued in relation to family law matters. Within the next year, this number is expected to drop to 15,000. Certificates will have capped hourly limits.

The Working Group intends to pursue issues related to the changing legal aid environment and to make recommendations with respect to unrepresented litigants. Preliminary suggestions include:

- legal aid duty counsel in the General Division;
- no court attendances unless it is absolutely necessary; and
- increased use of telephone motions and conferences.

Clearly legal aid in family law matters is important and must be addressed. However, as discussed in our *First Report*, legal aid issues are being actively considered in a number of forums.[8] The Civil Justice Review does not wish to duplicate these efforts and feels that it cannot add productively to the debate at this time.

The Need for a Family Law Review

While the Family Law Working Group has made considerable progress, both in developing new ideas and in pursuing implementation of the Review's earlier recommendations, its deliberations have been bedeviled by the same difficulties which bedevil Family Law generally in the diverse and populace Province of Ontario -- overlapping federal/provincial jurisdiction, multiple levels of courts with jurisdiction in the area (and the existence of differing rules of procedure and practices within those courts)[9], regional

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[8] *Id.*, at p.131.

[9] The Ontario Court of Justice (General Division) has general jurisdiction in family law matters, but procedures vary between the concentrated high volume practice in Toronto Region and elsewhere in the Province. The Ontario Court of Justice (Provincial Division) has statutory jurisdiction in some areas and concurrent jurisdiction with the General Division in other areas, with different fee structures and practices. The Unified

differences, urban/non-urban differences, deeply held convictions and the simple enormity and complexity of a subject that is voracious in its demands on the resources and energies of modern society. Matters of divorce, custody, support, child protection and care, family property, and the civil aspects of domestic disputes and violence -- octopus-like in the reach of their tentacles throughout society in general -- touch all of us in one fashion or another.

It is little wonder, then, that the Family Law Working Group has not been able to solve all of the difficulties relating to family law at this point in time and that it has been unable to reach a consensus in several difficult areas. These include such concerns as the ultimate shape of case management in family law cases; the application of ADR techniques and, in particular, whether mediation should be mandatory; the role of Case Management Masters as opposed to Judges in family law matters and whether, indeed, there should be such a role at all.

We have no doubt these problems can be sorted out in the long run, but the very process of dealing with them in the context of attempting to implement the recommendations of the Civil Justice Review has caused us to focus on something that has been flitting around the edges of our deliberations since the beginning of our mandate. Family law is a subject far too complex and controversial to be dealt completely and adequately within the context of a civil justice review itself. Just as "Family Law" is in a sense a world of its own, it requires -- and deserves -- a study of its own.

What is needed, in our view, is a "Family Justice Review" which endeavours to do for family law what the Civil Justice Review has been able to do for the balance of the civil justice system -- a "royal commission" on Family Law, if you will.

The area is vitally in need of reform. During our consultations around the province, the most frequent concerns raised related to family law issues.

Family Court has now been expanded to five centres across the Province -- Hamilton, London, Barrie, Kingston and Napanee -- without common procedures for each site.

As the Civil Justice Review, we have made a number of recommendations which we believe will improve the quality of family law services provided in Ontario. The Family Law Working Group has made considerable progress in certain areas in advancing the process further. We feel, however, that as a Task Force mandated to consider all aspects of the civil justice system, we have taken reform of the family law process as far as we can at this time. The complexity of the issues and the divergence of views impedes us from proceeding further in this field, without turning the Civil Justice Review into something which it was not intended to be. There is much more work that needs to be done, but it is work that cannot effectively be done without the benefit of further consultation and reflection, and a totally family-law focused mandate.

Accordingly, the Task Force makes the following recommendation:

RECOMMENDATION

We recommend that a Family Justice Review be undertaken to consider all family law issues, building upon the work of the Civil Justice Review and the Family Law Working Group, and involving consultation with representatives of all constituencies in this area including the family law Bench and Bar, representatives of the Ministry, and members of the Public who have participated in family law proceedings.

CHAPTER 8
COST OF CIVIL JUSTICE

8.1 COST RESEARCH

As discussed in our *First Report*[1], the civil justice system costs money. There are both institutional and individual litigant costs of civil justice. Institutional costs include those necessary to keep the civil justice system operating: the cost of facilities; judicial and administrative personnel; the salaries, benefits and support networks necessary for them to perform their functions; and services, equipment and technology. There are also costs to litigants. As users of the civil justice system, litigants have to pay the direct costs relating to their litigation, including legal fees and disbursements, such as administrative and witness fees.

At present, there is insufficient data available on these costs and little analysis. This is true not only for Ontario but for most other jurisdictions. Without this information, it is difficult to assess what is a reasonable and acceptable "cost" of civil justice and whether the public and litigants are receiving the best value for their expenditure on civil justice. Moreover, it is important to have such information available to guide and inform future reform choices.

In our *First Report*,[2] we recommended:

> [T]hat a research project be commissioned to examine and analyze the question of the "cost" of justice, both from an institutional or systemic perspective and from the perspective of individual litigants.

The Review feels strongly that this research be undertaken and wishes to reiterate its recommendation that such a project proceed. It had been proposed that this research project be undertaken by the Ontario Law Reform Commission. Prior to beginning the study,

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1 *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995), Chapter 11 [hereinafter "*First Report*"].

2 *Id.*, at p.131.

however, the Commission received news of its discontinuance. In light of these circumstances, we propose that the Ministry of the Attorney General be charged with the responsibility for setting up an appropriate Task Force or Working Group, with representation from the Judiciary, Bar, Ministry and Public to conduct this study.

RECOMMENDATION

We recommend that the Ministry of the Attorney General, in conjunction with the Judiciary, the Bar, and the Public, establish a Working Group to study the question of the "cost" of justice, both from an institutional perspective and from the perspective of individual litigants, with a view to completing a report within one year of the creation of the Working Group.

In making this recommendation, we would like to stress the importance of addressing the issue of the cost of lawyers' fees and, in particular, how those fees are arrived at. This was also discussed in our *First Report*.[3] Clearly, these costs can be a barrier to individual litigants in accessing the civil justice system. Many of our recommendations, both in our *First Report*, as well as this *Supplemental and Final Report*, will help to lessen the amount of legal fees borne by litigants through the earlier resolution of litigation and more streamlined procedures. Nonetheless, we continue to believe that the way legal fees are arrived at requires examination. The "billable hour", which currently appears to be the cornerstone of legal billing practises, is seen by many as resulting in legal fees that are unreasonably high. The Task Force suggests there are other alternatives, such as "results based" or overall value for services based billing, that should be considered by the legal profession. Accordingly, the Task Force makes the following recommendation.

RECOMMENDATION

We further recommend that the Working Group include in its study, in particular, the question of alternatives to the billable hour as a mechanism for establishing lawyers' fees,

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[3] *Id.*, at pp. 145 - 149.

including the concept of "results based" or overall value for services based billing.

8.2 CONTINGENCY FEES

Introduction

One of the sentiments we heard repeatedly, and which we reiterated throughout our *First Report*, is that civil justice costs too much money. For many members of the public it is unaffordable; unaffordability breeds inaccessibility. While we believe the implementation of our vision will reduce costs -- as both case management and alternative dispute resolution (ADR) have the potential to save parties money -- access to justice may still be a problem, particularly in the context of the current legal aid situation.

The public believes that the high costs of civil justice are due to a number of factors including the legal profession's billable hour approach to fees for service. During our consultations we heard both dismay and frustration expressed over the apparent lack of alternatives to this approach. One alternative billing practice frequently recommended to us was contingency fees.

In our *First Report* we described the results of a survey of the private bar which we commissioned in order to gain information on the costs to individual litigants. Based on the results of this survey, we concluded that lawyers' fees can be a barrier to access. This conclusion, coupled with the public's overall frustration, led us to determine that the profession needs to re-examine the way in which it charges its clients. In particular, we feel that consideration should be given to:

- examining alternatives to the billable hour; and
- whether contingency fees should be permitted.

With respect to the latter, we concluded in our *First Report* that "it is time to re-visit

the concept of contingency fees as a possible means of improving access to justice".[4] We noted, however, that there are a number of issues which need to be addressed, including:[5]

- whether contingency fees would increase access to civil justice;
- whether they would result in an overall cost saving;
- whether matrimonial and criminal matters should be excluded;
- what safeguards need to be put in place for clients, with respect to the reasonableness of the fee; and
- whether there should be limits on the percentage or recovery that may be agreed to as a fee.

In order to address these issues, as well as others with respect to legal fees, we recommended in our *First Report* that:[6]

> [A] working group be established, in conjunction with the Law Society of Upper Canada, for the purpose of addressing the issues involving legal fees and making recommendations to the Civil Justice Review in that regard for the purposes of its Final Report.

This Working Group has not yet been established. However, we would urge that these general issues regarding legal fees be included in the research project on the larger issue of costs recommended earlier.

History of the Debate on Contingency Fees

The issue of contingency fees has been considered on numerous occasions with a general consensus in favour of them. In 1988, the Canadian Bar Association - Ontario released a report on contingency fees in which it concluded that, on balance, such an arrangement

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[4] *Id.*, at p.148.

[5] *Id.*

[6] *Id.*, at p.149.

should be available in Ontario.[7] The Special Committee on Contingency Fees of the Law Society of Upper Canada also released a report in 1988 in which it recommended that contingency fees be approved in principle.[8] Convocation, which is the governing body of the Law Society and the legal profession, approved this recommendation. In 1992 the Special Committee released another report recommending a particular contingency fee scheme.[9]

In October, 1995, a Private Member's Bill was introduced in the Ontario Legislature which, if enacted, would permit contingency fee agreements for civil, non-family proceedings.[10]

Other Jurisdictions

At present, Ontario is the only provincial jurisdiction which does not allow contingency fees, although a form of contingency fee is available to representative parties in class actions.[11] The Canadian Bar Association of Ontario commented on this anomalous situation:[12]

> [I]s there not some equality right that is being infringed in terms of access to justice for members of the public in Ontario. Simply living in Ontario denies a client the right to retain a lawyer on a contingent fee basis. The Ontario resident is, therefore, denied an available access to justice option that exists for residents of all other jurisdictions in Canada.

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7 Canadian Bar Association - Ontario, *Opening Doors or Stirring Up Strife - The Implementation of Contingent Fees in Ontario* (March 15, 1988) [hereinafter "*CBAO Report*"].

8 Law Society of Upper Canada, *Report of the Special Committee on Contingency Fees* (May 27, 1988).

9 Law Society of Upper Canada, *Report of the Special Committee on Contingency Fees* (February 28, 1992).

10 Bill 3, *An Act to amend the Solicitors Act*, 1st Sess., 36th Leg. Ont., 1995 (1st Reading October 2, 1995).

11 See the *Class Proceedings Act*, S.O. 1992, c.6, s. 32.

12 *CBAO Report*, *supra*, note 7, at pp. 33 - 34.

Context of the Debate

The arguments often articulated in favour of contingency fees are:

- they will increase access to justice;
- they will save clients money;
- Ontarians should have the same right to enter into such arrangements as other Canadians; and
- legal aid expenditures may decrease.

The arguments against contingency fees focus on the potential for abuse. They include the contentions:

- that the lawyer will become an "interested" party with an attendant motivation to win at all costs;
- that contingency fees may lead to undue influence and excessive fees;
- that they will lead to less incentive to settle;
- that damage awards will be unduly inflated; and
- that there may be an increase in frivolous litigation.

Both sides of this debate have ardent supporters and it is difficult to decide conclusively which approach is the correct one. As stated in the *C.B.A.O. Report*:[13]

> In approaching this subject the reader of this report should appreciate, as this committee has, that to a great extent 'the whole subject of contingent fee contracts approaches the theological'....
>
> There is a lack of systematic studies and empirical data to support either side of the debate. Perhaps the majority concrete fact that this province has to deal with is that all of the other Provinces and Territories in Canada permit contingent fee contracts in varying forms and with varying controls. Their experiences would certainly seem to

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[13] *Id.*, at pp. 11 - 12.

indicate that many of the fears and concerns that gave rise to the original prohibition of contingent fees in Canada are unrealistic in terms of modern Canadian society and the practice of law in that society.

Despite the concerns, the current opinion appears to be in favour of allowing contingency fees so long as there are safeguards in place to protect the public.

Necessary Safeguards

While we accept that, on balance, contingency fees have merit, we are aware of the potential for abuse and the need for adequate safeguards. A review of the legislative schemes in other provinces reveals that there are a number of options, including:

- imposing a standard form contract;
- granting a right of review for all contracts;
- requiring all contingency fee agreements to be filed with the court;
- stipulating the form the agreement must take -- for instance, that it be in writing and signed by the client and the lawyer; that it describe the contingency on which payment is to be made; and that there be notice to the client of their right of review;
- prohibiting contingency fees in certain types of actions, such as criminal and matrimonial cases;
- imposing a cap on the percentage allowed; and
- having review mechanisms in place to ensure the reasonableness of the fee.

As illustrated in the chart included as Appendix 3 to our Report, provincial jurisdictions take differing approaches in this area. Based on our consideration of this information, the Review makes the following general recommendation.

RECOMMENDATION

We recommend that contingency fee agreements be permitted in Ontario in all matters except criminal and family proceedings. We further recommend that a standard form

agreement be used, which includes notice to the client of their right to have the agreement reviewed by the Court.

CHAPTER 9
ENHANCEMENT OF PARTICIPATION IN THE SYSTEM

Introduction

It was made clear during our consultations that the public is very enthusiastic about having some meaningful input into promoting the better administration of justice. Concerns were expressed, however, that the current vehicles for such public input -- the Ontario Courts Management Advisory Committee (OCMAC) and the Regional Courts Management Committees (RCMACs) were not being utilized to their fullest potential.

The *First Report* recognized that, if OCMAC and the RCMACs are to become an effective part of the civil justice system in Ontario, they must develop a more cohesive structure for purposes of co-ordinating and enhancing their advisory functions across the province.[1] It was further recommended that "these Committees be recognized and accepted by the Bench, the Ministry, the Bar and the Public as an important piece of the justice structure in Ontario, and that efforts be made to ensure that their mandate to consider and recommend policies and procedures to promote the better administration of justice and the effective use of human and other resources in the public interest, be duly carried out".[2]

Joint OCMAC/RCMAC Planning Session

Subsequent to the release of the *First Report*, a joint meeting of OCMAC and the RCMACs was held in May 1995 to address concerns raised about these Committees and to provide an opportunity for the Committee members to consider the mandate, structure, and inter-relationship of the Committees.

This was the first time Committee members had met together as a group to discuss their experiences and to develop a strategy for the future. Public participants gave freely of a summer weekend to take part in the conference, which underscored their dedication and strong

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[1] *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995), at p.108.

[2] *Id.*

support for a continuing public presence on these Committees. The main topics for discussion were:

- the mandate, role and responsibilities of the Committees and their participants;
- the experience and practices of the Committees to date; and
- information and skill needs for members.

Drawing on their experiences, participants discussed issues and concerns within the framework of these general topics. It was apparent from the outset that the participants felt strongly that there must be a renewed commitment on the part of the Ministry, Bench and Bar to OCMAC and the RCMACs in view of their potential contribution to the administration of justice in the province. A number of suggestions were made to improve the operation of these Committees. For example, many Committee members felt they could be more effective if their two-year appointments were extended. As well, they suggested that greater efforts be made to ensure that there be an equitable rotation of the chairing responsibilities among all Committee members. It was also suggested that a mentorship and training program be implemented, and that the Committees be better supported administratively.

Additional Recommendations

The Task Force reiterates its support for the continuation of OCMAC and the RCMACs. We believe that these Committees are important components of the justice system in Ontario. They are well-positioned to identify problems within the civil justice system, and to contribute effectively to their solution. The participatory process they bring to the justice system and the potential vehicle they provide for public input are vitally important.

However, in supporting the continuation of OCMAC and the RCMACs the Task Force acknowledges the need for these Committees to be revitalized. Over the past year, for example, the role of OCMAC has been filled by the Heads of Court Committee, which consists of the Chief Justices and the Chief Judge of the three levels of court, as well as the Deputy Attorney General and the Assistant Deputy Attorney General, Courts Administration. We

suggest that OCMAC should be resurrected to resume its role, as it is a more representative body which includes Bar and Public members.

We also would suggest that the revitalization of these Committees should ensure better coordination and interaction with local Bench and Bar Committees. Bench and Bar Committees currently exist in most regions and concern themselves with day-to-day problems in the region concerning court operation. Consideration should be given to ensuring regular liaison between these respective Committees in order to identify justice system issues and to arrive collaboratively at the most effective solutions.

In addition, we are of the view that a number of the recommendations arising out of the May 1995 Joint OCMAC/RCMAC Planning Session, discussed earlier, should be adopted to further support the revitalization of these Committees. We also feel that, outside of public representation on the Committees, it is important for there to be regular community input. This could be accomplished, for example, by inviting community interest groups to make submissions on issues related to the better administration of justice.

For clarity and emphasis we reiterate here the recommendation contained in our *First Report*,[3] namely that:

> **These Committees be recognized and accepted by the Bench, the Ministry, the Bar and the Public as an important piece of the justice structure in Ontario, and that efforts be made to ensure that their mandate to consider and recommend policies and procedures to promote the better administration of justice and the effective use of human and other resources in the public interest, be duly carried out.**

In this context, and having regard to the foregoing comments, the Review makes the following additional recommendations.

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[3] *Id.*, at p.108.

RECOMMENDATION

With respect to OCMAC and the RCMACs, we further recommend that:

- **there be sufficient administrative staff to support and co-ordinate the work of these Committees, including following up on Committee recommendations;**
- **that the terms of the Public and Bar members be extended to three years;**
- **that the duties of the Chair be regularly rotated among Committee members;**
- **that annual meetings be held to review the status of Committee recommendations, set agendas for the next year, and assess the Committee's performance;**
- **that there be more input and access to these Committees by community stakeholders by inviting formal written submissions or presentations from interested groups;**
- **that a formal orientation program be developed, in consultation with the Regional Senior Justice and Courts Administration, to familiarize newly-appointed members to the Committees;**
- **that there be regular liaison between these Committees and local Bench and Bar Committees in order to identify justice system issues and to arrive collaboratively at the most effective solutions.**

CHAPTER 10
CLOSING COMMENTS

"Court Management is no sport for the short winded"
Dean Roscoe Pound (again)

How apt -- these oft-repeated sentiments of Dean Roscoe Pound -- for the odyssey of the Civil Justice Review begun in April 1994, and for the cause of civil justice reform generally in Ontario. The march has begun but there is much ground to cover yet!

A joint initiative of the Ontario Court of Justice (General Division) and the Ministry of the Attorney General, the Civil Justice Review embarked upon a broad review of the civil justice system in Ontario in April 1994. Our mandate was to develop a practical and "implementable" strategy to provide a speedier, more streamlined, less costly and more effective civil justice system for the Province -- a more "just" system, in a word. We believe that we have done just that

After a year of intensive consultation with the Public and with the Bench, Bar and Administration, our *First Report* was released in March 1995. It contained 78 recommendations and a great deal of concerted energy has been expended since its release and acceptance by the Chief Justice and the Attorney General towards the implementation of those recommendations. This process of implementation, and the four-participant involvement of the bench, bar, administration and public in the Civil Justice Review process, have been -- to our minds -- the most dramatic developments arising out of our deliberations.

The core recommendations of our *First Report* were these:

- the transformation of courts -- using that term in a broad sense -- into "Dispute Resolution Centres", adopting a "multi-door" concept of dispute resolution and providing access to the system through a variety of alternative dispute resolution techniques, or "doors", depending upon the needs of the particular case;

- the elimination of existing backlog problems, particularly in the busy urban centres;

- the establishment of a province-wide case management system that will:

  -- provide time standards for the speedy resolution of cases in the system;

  -- reduce delay and prevent the recurrence of backlogs;

  -- facilitate the integration of ADR techniques into the system;

  -- create Case Management Teams comprised of Judges, Judicial Support Officers (now to be called Case Management Masters) and Case Management Co-ordinators; and,

  -- assign to teams the responsibility and accountability for the management of the inventory of civil cases;

- the implementation of a technological infrastructure to modernize and automate the civil justice system;

- the enhancement of public involvement in the system;

- "plain language" communications with the public and the use of automated technology to improve the public's access to information about the system;

- four participant co-operation amongst government, bench, bar and the public in operation of the system;

- the creation of a single issue Task Force comprised of representatives from the public, the judiciary, the bar and government with a mandate to develop a proposal for a unified management, administrative and budgetary structure for the courts.

Our vision of the essentials of the modern civil justice system has not changed. In the *Supplemental and Final Report* we have endeavoured to reinforce the importance of those core recommendations and, happily, have been able to report on significant progress which is being made towards their implementation. Partly as an aspect of implementation, and partly as a means of providing new shape to new directions, we have also expanded and built upon the *First Report's* recommendations in key areas such as:

- *case management*, including a set of province-wide rules and a proposed "roll out" across Ontario by the beginning of the year 2000, with immediate implementation in the pilot project sites, immediate expansion to 25% case management in Toronto and immediate introduction of 100% case management in Ottawa;

- *ADR*, including recommendations concerning mandatory referral to mediation and a proposed service delivery and funding model;

- *venue*, with suggestions for spreading the caseload more evenly around the Province and for expediting the movement and hearing of cases in a way that will utilize existing facilities and resources in a more effective fashion;

- *enforcement*, embracing the need for consolidating reform and suggesting a guiding set of principles for that reform with its mix of privatization;

- *small claims*; and,

- *landlord and tenant proceedings*.

We are conscious of the fact that some areas have eluded our complete or further recommendations. The dictates of time and available resources have played a role in that. We have not been able, for example, to conduct the further examination in the area of the cost of litigation that we had hoped at the end of our *First Report* to be able to do. While we are satisfied that the Civil Justice Review's proposals, when put in place, will result in a less costly civil justice system, we have noted that a more systematic study of the "cost" of litigation from both an institutional and individual litigant's perspective, is required to identify the factors driving those costs and solutions to bring them within the reach of both taxpayers and disputants.

Family Law is another area which demands continued study and reform and which, indeed, warrants a full scale "Family Justice Review" of its own. The "early resolution focused" approach to family law disputes recommended in our *First Report* -- much of which is in the process of being set in motion -- will streamline and improve the disposition of these matters. At the same time, however, as we have noted in the *Supplemental and Final Report*,

there are complex and deep-seated problems remaining to be addressed and resolved.

We have also observed that our call for a single issue Task Force to focus on the development of a unified management, administration and budgetary model for the operation of the justice system has not yet been taken up in any organized fashion. As we remarked in the *First Report*, this issue reaches beyond the civil aspects of the court system and encompasses the criminal structure as well. Finding a solution to this vexing problem for the justice system as a whole is critical to its ultimate effective reform, and we urge again that a Task Force of the sort we recommended earlier be established.

While there are certain differences between Ontario and the United Kingdom in terms of how the justice system is organized, we note the creation in England of a Court Services Agency to manage and operate the courts, as a potential model. Under this model, those charged with the responsibility of running the courts are provided with greater autonomy and freedom in incurring expenditures, recruiting and managing staff and developing systems so as best to meet the needs of all those who use the courts. They are able to do so with their own discrete budget prepared and allocated separately and apart from the maelstrom of demands and counter-demands created by the existence of other intra-departmental priorities when the administration of the courts is simply one part of a larger multi-dimensioned Ministry.

All in all, the remark of Dean Roscoe Pound -- quoted in our *First Report* and repeated at the outset of this concluding Chapter -- continues to ring true, injecting at the same time a sense of the challenge to be overcome and an air of reality into the exercise that the Civil Justice Review has undertaken. Court management and court reform are indeed not "sport for the shortwinded". With a dedicated, well-planned and intelligent approach, however, the course can be negotiated and the prize attained.

We hope that the process of the Civil Justice Review itself, and our two Reports, have helped to set the civil justice system in Ontario on that course. There is much, as we have

said, that remains to be done.

The transmittal letter which accompanied the *First Report* to the Chief Justice and the Attorney General contained this statement:

> It is our belief, that the process of the Review represents the beginning of a collective dialogue among the partners in civil justice. The good will and support demonstrated by the bench, bar, government representatives and the public in working together towards collective solutions were truly encouraging. It is still however a fragile dialogue and will need to be nurtured through [the Chief Justice and the Attorney General] and the leadership of [their] agents.

These observations continue to hold true. It is critical that the momentum created by the will for reform that presently exists among the leaders and members of the Ministry, the Bench and the Bar not be lost, *and* that new and better ways to ensure more meaningful involvement of the public continue to be sought. Consistency, persistence, continuity and focus on the part of those participating in the process will be essential.

And now, for the second wind .....!

APPENDICES

APPENDIX 1:

ONTARIO CIVIL JUSTICE REVIEW

TERMS OF REFERENCE

PREAMBLE:

Traditionally, in Ontario, members of the public have resolved their civil disputes through the court process. This process -- based primarily upon the adversarial method of dispute resolution has ultimately led to justice.

In recent times, however, because of the pressures of modern litigation, such justice has come at great expense to the litigants, and, too often, after numerous and lengthy delays.

The members of the public require a more efficient, less costly, speedier and more accessible civil justice system.

A CIVIL JUSTICE REVIEW:

To achieve this objective, the Government of Ontario and the Ontario Court of Justice (General Division), in co-operation with the Bar, have agreed to undertake a broad review of the civil justice system in Ontario. This review is mandated to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilisation of public resources allocated to civil justice. It will identify the various problems within the existing system and design specific and implementable solutions to these problems.

The Review will be conducted by a small Task Force jointly chaired by The Hon. Robert Blair, a Justice of the Ontario Court of Justice (General Division), and Ms. Sandra Lang, the Assistant Deputy Attorney General - Courts Administration. There will be two other members on the Task Force: a senior representative of the Bar and a representative of the Public.

The Review will conduct its mandate through two separate groups: an Interim Task Group and a Fundamental Review Task Group. Each will be responsible directly to the Task Force itself. The Interim Task Group will be supervised by Justice Blair and Ms. Lang. The Fundamental Review Group will be supervised by the Chair of the Ontario Law Reform Commission and the Director - Policy Development Division of the Attorney General.

A. Interim Task Group

The Interim Task Group will be responsible for identifying immediate points of pressure on the system and for developing proposals, to be implemented in the short/intermediate term, dealing with such things as:

a) the backlog;
b) case flow management and alternative resolution techniques;
c) venue for civil cases;
d) management information systems, scheduling, tracking and statistics gathering;
e) the re-organization of administrative staff and courts administration;
f) Judicial support work and auxiliary judicial officers;
g) temporary court rooms;
h) construction lien caseload;
i) issues respecting the jurisdiction and staffing of Small Claims courts;
j) the design of strategies to address other pressures and problems identified but not dealt with.

This will involve not only the creation and development of new solutions, but also the co-ordination and integration of the several initiatives already underway amongst the judiciary, the Bar and Courts Administration. In this latter category are such things as:

a) the current case management projects in Toronto, Windsor and Sault Ste. Marie;
b) the pending ADR Centre in Toronto;
c) the recently launched Advocates' Society Civil Litigation Task Force;
d) the current "Simplified Rules" study, designed to develop a new set of more easily understood and applied rules for cases involving smaller amounts of money;
e) a review of the appropriate venue for civil cases;
f) the review of electronic data interchange and its application to the courts, already begun by the Ministry;
g) the Toronto court re-engineering project which is now underway.

B. Fundamental Review Group

It will be the function of the Fundamental Review Group to deal with issues of longer range implications for the civil justice system. Although longer range in its focus than the Interim Task Group, the Fundamental Review Group will nonetheless concentrate on recommendations and proposals that are achievable rather than simply for purposes of discussions.

The Review will draw upon the resources and skills of the Chair of the Ontario Law Reform Commission and the Director of Policy Development Division in connection with this aspect of its work. It may ask the Attorney General to request the Commission to review and report on matters fundamental to the Civil Justice System and the Review will take such Reports as are forthcoming into consideration in arriving

at its ultimate recommendations regarding its long range proposals.

Some areas which are to be considered in this aspect of the Review's mandate are the following:

a) the role and function of civil juries;
b) the question of how the superior trial courts can most appropriately and effectively carry out their mandate in dealing with civil cases, in terms of the way in which various types of cases are processed within and/or outside of the courts;
c) the role of Small Claims courts in providing effective access to the system, and the jurisdiction and structure of such courts;
d) the role of private industry in providing alternative methods for parties to resolve issues without resorting to the judicial process. This would include mediation, arbitration and other alternative dispute resolution processes;
e) the role and obligations of litigants to avail themselves of the various resolution initiatives provided by the court prior to the entitlement to a trial.

Time Frames

Interim Task Group Report

It is expected that the Interim report will be completed by November 1994.

Overall Review Report

It is expected that the review will have completed its final report by the Spring of 1995.

General Considerations

The Review will consider the way in which resources are allocated to the justice system and the criteria upon which such allocation is based, whether the appointment of additional resources is needed and justified, and in what ways existing resources can be effectively re-allocated and re-aligned.

APPENDIX 2: DRAFT CIVIL CASE MANAGEMENT RULES - PROPOSED BY THE CASE MANAGEMENT WORKING GROUP

1. Civil Case Management Rules

2. Forms

   - Notice of Commencement of Proceedings
   - Notice of Defence or Response
   - Civil Case Management Motion Form
   - Consent for Alternative Dispute Resolution
   - Certification of Alternative Dispute Resolution
   - Trial Management Conference Report

3. Flow Chart

CIVIL CASE MANAGEMENT RULES

RULE 1 - APPLICATION AND INTERPRETATION OF RULES

CIVIL CASE MANAGEMENT RULES

Scope

1.01 (1) These rules apply to all actions and applications commenced after a date to be specified by Order in Council for each County and Judicial District.

Exception

(2) These rules do not apply to actions or applications to which the Family Case Management Rules apply, actions or applications which have been designated by a senior regional justice as exempt from these rules or actions pursuant to the Construction Lien Act.

Rules of Civil Procedure

(3) The Rules of Civil Procedure, including Simplified Procedure, also apply to actions or applications to which these rules apply, but these rules prevail in the event of conflict, except that in no event shall these rules be construed as authorizing examinations under oath prohibited by Rule 76.

(4) A time prescribed in these rules or the Rules of Civil Procedure may be extended only by order of the court.

Format of Documents

(5) The forms prescribed in these rules and notices, certificates and orders referred to in these rules may be single spaced, may bear the short title of the action and need not have a backsheet.

PURPOSE

1.02 The purpose of these rules is to establish a case management system that reduces unnecessary cost and delay in civil litigation, facilitates early and fair settlements and brings actions expeditiously to a just determination while allowing sufficient time for the conduct of the action.

DEFINITIONS

1.03 (1) In these rules,

"case management judge" means the judge or a member of a team of judges assigned to manage an action or application;

"case management master" means a person appointed by the Chief Justice of the Ontario Court (General Division) to assist the case management judges in the management of actions and applications pursuant to these rules;

"track" means the system of case management provided for an action by rule 6.00;

"close of pleadings" has the meaning specified by the Rules of Civil Procedure in the case of an action, and in the case of an application means a date ten days after the first affidavit has been filed by a respondent in the application;

"timetable" means an order of a case management judge or case management master specifying a schedule for the completion of any step required to advance the proceeding, including delivery of affidavits of documents, examinations under oath where available, or motions.

(2) Third and subsequent party actions shall be issued in the same proceeding as the main action, and pleadings in the main action and third and subsequent party action are closed when a reply has been delivered to the defence to the last subsequent party claim, or the time for delivery of such a reply has expired.

Case Management Master

1.04 (1) A case management master has the same powers and duties as a case management judge with respect to a proceeding, except the power to hear a motion that is not within the jurisdiction of a master under subrule 37.02(2), (jurisdiction of a master) of the Rules of Civil Procedure, or except where these rules otherwise provide.

(2) Case Management Masters may manage, under the direction of the case management judges, all proceedings assigned to case management.

RULE 2 - DISMISSALS BY REGISTRAR

2.00 Any application or action which has not been resolved by a final order or judgment, and in which no Notice of Service of Defence or affidavit on behalf of a respondent has been filed shall be dismissed by the registrar as abandoned 180 days after the issue of the originating process.

2.01 The form of an originating process shall be amended to include a warning in the terms of paragraph 2.00.

RULE 3 - GENERAL PROCEDURE FOR ALL TRACKS

COMMENCEMENT OF ACTION/FILING OF DEFENCE OR MOTION

Notice of Commencement of Proceedings

3.01 (1) A plaintiff or applicant shall complete and attach a Notice of Commencement of Proceedings (Form 1) to every originating process, and the Notice of Commencement of Proceedings shall be served with the originating process.

(2) Where counsel issues an originating process he or she shall provide his or her client with a copy of same.

3.02 An originating process shall be deemed to have been issued when a Notice of Commencement of Proceedings is filed, and the originating process shall not be filed until some further step is taken in the proceeding other than the filing of a Notice of Discontinuance, or it is required for a hearing.

3.03 (1) On filing the Notice of Commencement of Proceedings, the plaintiff or applicant shall choose the fast track or standard track for the action or application.

Choice of Track

(2) In choosing a track, the plaintiff or applicant shall have regard to all relevant considerations, including,

(a) the complexity of the issues of fact or law;

(b) the likely expense to the parties;

(c) the importance to the public of the issues of fact or law;

(d) the number of parties or prospective parties;

(e) the amount of intervention by the case management judge that the action is likely to require; and

(f) the time required for proper discovery if applicable and preparation for trial.

Track Chosen by Plaintiff or Applicant

(3) The action or application shall proceed on the track chosen by the plaintiff or applicant unless the court orders otherwise.

Change of Track

3.04 (1) A case management judge or case management master may order that an action or application be transferred from one track to the other.

(2) A party who seeks an order under subrule (1) shall move for the order before the close of pleadings.

(3) On a motion under subrule (2) a case management judge or case management master shall have regard to the matters set out in subrule 3.03(2).

Application of Case Management

4.00 (1) On the filing of a Notice of Service of Defence in an action, an affidavit by a respondent in an application, or of any motion by a party adverse in interest to the plaintiff or applicant, rules 4.00 to 7.00 shall become applicable to such action or application.

(2) A defendant who serves a Statement of Defence shall not file the statement of defence with proof of service unless the document becomes relevant to some issue to be determined by a court, but shall file a Notice of Service of Defence (Form 2).

(3) Filing a Notice of Service of Defence shall constitute delivery of a statement of defence.

(4) Proceedings to which Rule 76 applies shall be deemed to be on the fast track. The pretrial referred to in Rule 76.07 and the Rules of Civil Procedure shall constitute a settlement conference under these rules.

(5) All fast track cases will be subject to Rule 76 so far as production of documents.

FAILURE TO COMPLY WITH TIME REQUIREMENT

POWERS OF CASE MANAGEMENT JUDGE OR CASE MANAGEMENT MASTER

4.01 (1) Where a party fails to comply with a time requirement established by the Rules of Civil Procedure or these rules, a case management judge or case management master may,

(a) convene a case conference;

(b) create or amend a timetable and order the party to comply with the timetable; or

(c) order the party or the party's solicitor to pay costs, including solicitor and client costs fixed and payable forthwith.

Powers of Case Management Judge

(2) Where a party fails to comply with a timetable, a case management judge may,

(a) strike out any document filed by the party;

(b) dismiss the party's action or strike out the party's defence; or

(c) make any other order that is just.

RULE 5 - CASE MANAGEMENT MOTIONS, AND CASE CONFERENCES

Case Management Judge

Duties

5.01 (1) A case management judge shall deal with all matters that arise in the action before the trial, including all motions, case conferences and settlement conferences, except where these rules provide otherwise.

Informal Motion Procedure

(2) A motion may be made, depending on the practical requirements of the situation,

(a) with or without supporting material or a motion record;

(b) by attendance, conference call, telephone call or telephone transmission, or in writing.

Motion without Material

(3) Where a motion is made without supporting material or a motion record,

(a) a case management motion form (Form 3) signed by the moving party's solicitor

shall be submitted to the court before the motion is heard;

(b) a case management motion form signed by the responding party's solicitor may be submitted to the court before the motion is heard;

(c) a case management judge, case management master or registrar shall record the disposition of the motion on the form;

(d) no formal order need be prepared, signed or entered unless a case management judge or case management master directs otherwise.

Confirmation - Opposed Oral Motion

(4) On an opposed motion that is to be argued orally, the moving party's solicitor shall confirm to the registrar by facsimile transmission, by 2 p.m. two days before the hearing date, that the motion is to proceed as scheduled, failing which the motion shall not proceed on that date.

Powers on On Initiative

(5) A case management judge or case management master may, on his or her own initiative, require a hearing, case conference or conference call to deal with any matter arising in connection with case management, including a failure to comply with these rules or the Rules of Civil Procedure.

Powers Generally

(6) Subject to Rule 1.05, a case management judge or case management master may,

(a) extend or abridge a time prescribed by an order, these rules or the Rules of Civil Procedure;

(b) transfer an action from one track to the other;

(c) adjourn a case conference; and

(d) set aside an order made by the registrar under these rules.

(7) A case management judge may,

(a) direct a reference under Rule 54 of the Rules of Civil Procedure; and

(b) make orders, impose terms and give directions as necessary to carry out the purpose of these rules.

Costs on Motions

(8) The case management judge or case management master shall at the conclusion of each motion address the issue of costs and where appropriate fix the costs and order them payable forthwith.

Motions for Leave to Appeal

(9) A motion for leave to appeal from an order of a case management judge shall be made to another judge, and from an order of a case management master to a judge.

Motions Dealt With by Registrar

(10) The registrar shall make an order granting the relief sought on the following motions:

1. A motion for an order on consent, where the consent of all parties is filed, the consent states that no party affected by the order is under disability, and the order is for,

   i. amendment of a pleading,

   ii. addition, deletion or substitution of a party,

   iii. change of or appointment of a solicitor of record,

   iv. setting aside the noting of a party in default,

   v. setting aside a default judgment,

   vi. discharge of a certificate of pending litigation,

   vii. security for costs in a specified amount,

   viii. re-attendance of a witness to answer questions on an examination,

   ix. fulfilment of undertakings given on an examination, or

   x. dismissal of an action with or without costs.

2. A motion for an unopposed order, where no responding material is filed and the notice of motion or the case management motion form states that no party affected by the order

is under disability, and the order is for relief set out in subparagraphs i to x of paragraph 1.

CASE CONFERENCE

How Convened

5.02 (1) A case management judge or a case management master may convene a case conference at any time, on his or her own initiative or at a party's request.

Parties' Attendance

(2) A case management judge or a case management master may direct that the parties, or a representative of the parties responsible for making decisions regarding the proceeding and instructing the solicitor, attend the conference personally.

Matters to be Dealt With

(3) At the conference a case management judge or case management master may,

(a) identify the issues, and note those that are contested and those that are not contested;

(b) explore methods to resolve the contested issues;

(c) if possible, secure the parties' agreement on a specific schedule of events in the action; and

(d) review and, if necessary, amend the timetable for the action.

Counsel

(4) Counsel attending the conference shall have authority to deal with the matters referred to in subrule (3) and shall be fully acquainted with the facts and legal issues.

Powers of Judge

(5) At the conference, a case management judge may, where appropriate,

(a) make a procedural order;

(b) make an order for interlocutory relief;

(c) on consent of the parties, refer any issue for alternative dispute resolution;

(d) convene a settlement conference;

(e) convene a hearing;

(f) give directions; and

(g) make an order requiring a party to obtain the report of an expert, and set the terms for payment and instruction of the expert.

Powers of Case Management Master

(6) At the conference, a case management master may, where appropriate,

(a) make such orders and give such directions as are permitted by these rules to be made or given by a case management master;

(b) on consent of the parties, refer any issue for alternative dispute resolution;

(c) convene a settlement conference;

(d) convene a hearing.

RULE 6 - SETTLEMENT CONFERENCES

Settlement Conference

6.00 (1) The registrar shall on at least 45 days notice to the parties, schedule a settlement conference to take place not later than 90 days after the close of pleadings in the case of a proceeding on the fast track, and in the case of a proceeding on the standard track, not later than 240 days after the first defence is filed in an action, or the first responding affidavit in an application.

(2) All discoveries, production of documents and motions arising out of discoveries, if any, shall be completed before the settlement conference date.

Parties' Attendance At Settlement Conference

(3) A case management judge or case management master may direct the parties, or a representative of the parties responsible for making decisions in the proceeding and instructing the solicitor, to attend all or part of a settlement conference personally with their counsel.

Settlement Conference Brief

(4) Except in actions to which the Simplified Rules apply, the plaintiff or applicant shall deliver not later than ten days before the settlement conference a settlement conference brief, containing all material the plaintiff or applicant considers necessary for the settlement conference, and shall certify that rule 6.00(2) has been complied with.

Other Parties To Deliver Briefs

(5) Except in actions to which the Simplified Rules apply, every other party shall deliver a settlement conference brief containing any other material the party considers necessary for the settlement conference not later than five days before the conference.

(6) A settlement conference brief shall contain:

(a) (i) a concise summary of the facts;

(ii) where necessary issues and law to be relied upon by each party;

(b) a concise summary of the agreed upon facts and admissions;

(c) a list of witnesses and a summary of each witness's evidence;

(d) the relevant portions only of transcripts, experts' reports and other evidence that may be adduced at trial.

Trial Date

(7) At the settlement conference, a case management judge or case management master shall assign a trial or hearing date, or refer the parties to a civil team leader judge for the assignment of a trial or hearing date.

Trial Record

(8) A trial or application record shall be served and filed in accordance with rule 48.02 or rule 38.09(1) of the Rules of Civil Procedure no later than seven days before the trial or hearing date.

RULE 7 - TRIAL MANAGEMENT CONFERENCE

7.01 A trial management conference may be held on or following the setting of a trial date, at the request of one of the parties, or on the initiative of a judge or case management master.

7.02 A trial management form (Form 6) shall be submitted by the plaintiff or applicant, and

at the option of a defendant or respondent, no later than 14 days before the trial, or four days before the trial management conference, whichever is earlier.

7.03 At the trial management conference, the case management master or judge may,

(i) canvass with the parties the names of the witnesses intended to be called, and the substance of their testimony;

(ii) explore whether admissions can be made which will facilitate proof of non-contentious matters;

(iii) explore alternate methods of presentation of evidence, such as the filing of affidavits or reports;

(iv) explore with counsel expeditious means for the presentation of documentary evidence;

(v) give directions regarding the order of calling of witnesses;

(vi) give directions which will facilitate the orderly unfolding of the evidence.

RULE 8 - ADVISORY COMMITTEE

The Chief Justice of the Ontario Court of Justice (General Division) shall appoint an advisory committee composed of such members of the Bench, Bar, Ministry and the Public as are necessary to monitor these rules and, where appropriate, to make recommendations for improvement.

RULE 9 - TRANSITIONAL PROCEEDINGS

(1) Where a proceeding has been commenced before the date of coming into force of these rules, and where no notice of service of defence or affidavit in response has been filed as of that date, the 180 day period described in Rule 2.00 shall begin to run on the date these rules come into effect in the geographic area where the proceeding was commenced.

(2) Where a proceeding has been commenced before the date of coming into force of these rules and a statement of defence or affidavit in response has been filed before that date, the proceeding shall be dismissed by the registrar unless within 365 days from the coming into force of these rules the parties have fixed a date for a settlement conference.

RULE 10 - MANDATORY MEDIATION

Where mandatory mediation rules have been proclaimed in force, the following apply:

10.01 The registrar shall, upon the filing of the first notice of defence or other document in response to the proceeding, issue a notice to the parties for an appointment with an approved mediator ("the mediation appointment") and the plaintiff or applicant shall notify the other parties of the mediation appointment.

10.02 The mediation appointment shall be within 60 days from the filing of the first defence or responding document.

10.03 The parties and their counsel shall attend for the mediation appointment unless they file with the registrar, no later than 10 days before the mediation appointment, either:

(a) the consent in Form 4 of all parties indicating:

(i) that the parties have consented to an alternative approved mediator or leave has been granted for an alternative form of dispute resolution such as neutral evaluation, mini-trial or arbitration or leave has been granted for mediation by a person not on the roster;

(ii) that the mediation or alternate form of dispute resolution will be completed on or before the date scheduled for the mediation appointment; or

(b) an order of a judge or case management master dispensing with the mediation appointment.

10.04 If the parties and their counsel do not comply with the above rules, the party or parties in default shall forthwith pay a cancellation fee fixed by regulation to the Court, failing which the claim will be dismissed by the registrar (if the plaintiff or applicant defaults), or the defence or respondent documentation will be struck by the registrar (if the defendant or respondent defaults).

10.05 At the conclusion of the mediation appointment or such other appointment as is consented to under paragraph 10.03 above, the court approved mediator or the alternative dispute resolution service specified in Form 4 shall certify that the mediation or alternative dispute resolution has taken place and shall file Form 5 with the court. The form shall specify if the matter is settled.

10.06 These rules run concurrently with the balance of the case management rules and will not, in the absence of an order of a judge or case management master, serve to expand the time limits provided therein.

- - - - - - - - - - - - - - -

Form 1 **Court File No.**

(Short Title of Proceedings)

NOTICE OF COMMENCEMENT OF PROCEEDINGS

A proceeding has been commenced by_____ against _____.

The cause of the action arose on _____. The action is for:

collection	[ ]	construction lien	[ ]
motor vehicle	[ ]	negligence	[ ]
real property	[ ]	landlord/tenant	[ ]
contract/commercial	[ ]	trust/fiduciary duty	[ ]
wrongful dismissal	[ ]	medical malpractice	[ ]
estates	[ ]	other professional malpractices	[ ]
bankruptcy	[ ]	other	[ ]

The Simplified Rules Apply [ ] yes [ ] no Choice of Track [ ] Fast [ ] Standard

Plainltiff's Counsel: (or plaintiff if unrepresented)		Defendants' Counsel: (or defendant if unrepresented)		
Name:	(1)	Name:	(2)	Name:
Address:		Address:		Address:
Phone:		Phone:		Phone:
Fax:		Fax:		Fax:

Plaintiff's soliclitor's Law Society Registration No.

Defendant's solicitor's Law Society Registration No. (if known)

Warning: ***In accordance with the Case Management Rules this form must be provided to the litigants.***

Form 2 **Court File No.**

(Short Title of Proceedings)

NOTICE OF DEFENCE OR RESPONSE

NAME, ADDRESS, FAX OF PARTY	COUNSEL	DOCUMENT SERVED	DATE OF SERVICE

Note: This form must be filed when the first defence or response is served.

CIVIL CASE MANAGEMENT MOTION FORM

ONTARIO COURT (GENERAL DIVISION) Court File No.....

SHORT TITLE OF CASE:

.....

THIS FORM FILED BY (Check appropriate boxes to identify the party filing this form as a moving/responding party on this motion AND to identify this party as plaintiff, defendant, etc. in the action)

[ ] moving party
[ ] responding party

[ ] plaintiff/petitioner/applicant.....
[ ] defendant/respondentname.....
[ ] other-specify kind of party and name.....

MOTION MADE

[ ] on consent of all parties [ ] on notice to all parties and unopposed**
[ ] without notice [ ] on notice to all parties and expected to be opposed**
(**Filing Fee Required}

Notice of this motion
was served on (date): by means of: .....

METHOD OF HEARING REQUESTED

[ ] in writing only, no appearance [ ] conference telephone call-see below
[ ] telephone call (motion without notice) - see below [ ] appearance-see below
Date, time and place for conference call, telephone call or appearances

.....
(date) (time) (place)

ORDER SOUGHT BY THIS PARTY (Responding party is presumed to request dismissal of motion and costs)

[ ] Extension of Time - Until (give specific date):.....
[ ] serve Claim [ ] file or deliver Defence [ ] complete Discoveries [ ] other.....

[ ] Other Relief - be specific.....
.....
.....

MATERIAL RELIED ON BY THIS PARTY

[ ] this form [ ] pleadings [ ] affidavits-specify [ ] transcript-specify [ ] other-specify
.....

GROUNDS IN SUPPORT OF/IN OPPOSITION TO MOTION (INCLUDING RULE AND STATUTORY PROVISIONS RELIED ON)

.....
.....
.....

CERTIFICATION BY SOLICITOR

I certify that the above information is correct, to the best of my knowledge.
Signature of solicitor (*If no lawyer, party must sign*)
.....Date.....

THIS PARTY'S LAWYER *(If no lawyer, give party's address for service, telephone and fax number)*

Name and firm
Address

Telephone Fax

OTHER LAWYER *(If no lawyer, give other party's name address for service, telephone and fax number.*

Name and firm
Address

Telephone Fax

OTHER LAWYER *(If no lawyer, give party's address for service, telephone and fax number)*

Name and firm
Address

Telephone Fax

OTHER LAWYER *(If no lawyer, give other party's name address for service, telephone and fax number.*

Name and firm
Address

Telephone Fax

DISPOSITION BY CASE MANAGEMENT JUDGE/MASTER

[ ] order to go as asked [ ] adjourned to
[ ] order refused [ ] order to go as follows:

.....
.....
.....
.....

Hearing Method .....Hearing duration .....min.

Heard in: [ ] courtroom [ ] office

[ ] Successful party MUST prepare formal order for signature
[ ] No copy of disposition to be sent to parties
[ ] Other directions-specify

.....
.....

Judge's/Master's Judge's/Master's
Date.....Name.....Signature.....

Form 4 **Court File No.**

(Short Title of Proceedings)

CONSENT FOR ADR

The parties hereby consent:

1. To attend for mediation (or other form of ADR) with the following alternative mediator:_____

2. The mediation appointment is on:_____(*must be a date before the court scheduled mediation appointment*)

*If alternative form of ADR specify here:

Signed:_____

(*Parties or Counsel*)

Form 5 **Court File No.**

(Short Title of Proceedings)

CERTIFICATION OF ADR

This is to certify that a Alternative Dispute Resolution meeting has taken place:

Dated:

Signed: _____

(Court Approved ADR provider)

The action has: [ ] settled - all issues

[ ] settled only on the following issues:

[ ] not settled

Form 6

TRIAL MANAGEMENT CONFERENCE REPORT

Short Title _____ File#_____

Trial Management Judge: _____

Date of Trial Management Conferences _____

Trial Counsel: Plaintiff Defendant

_____

_____

_____

_____

Jury: yes_____ no_____

Filed by Plaintiff _____ Defendant_____ Subsequent Party_____

---

1. Issues Outstanding

a) liability: _____
_____

b) damages: _____
_____

c) other: _____
_____

2. Plaintiff's Witnesses

Names	**Estimated time for Examination-in-chief**
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

3. **Defendant's Witnesses**

Names	**Estimated time for Examination-in-chief**

4. **Document Brief**

a) Prepared: yes_____ no_____

b) If no, will be prepared by counsel for the _____ and delivered by _____(date)

(c) Comment _____

_____

5. **Expert's Reports**

a) Are any "reply" reports anticipated? yes_____ no_____

b) If "yes", do they create any timing problems regarding readiness for trial? yes_____ no_____

6. **Admissions Made**

a) By plaintiff _____

_____

_____

b) By defendant #1 _____

_____

_____

c) By defendant #2 _____

_____

_____

7. Notice To Admit Facts/Documents

a) Served by plaintiff: yes_____ no_____

b) If no, will be served by: _____(date)

c) Served by defendant(s): yes_____ no_____

d) If no, will be served by: _____(date)

e) Comment: _____
_____

f) Would a chronology, cast of characters or chart of corporate parties with shareholders, directors, officers, etc. be useful and if so, who will prepare them?
_____
_____

8. Amendments to Pleadings

a) Have all parties considered the pleadings and are any amendments likely to be sought?
_____
_____

b) If amendments are likely, will this create problems with readiness for trial?
_____
_____

9. Damages

a) Has a damages brief been delivered? yes___ no___

b) If "no", will one be delivered before trial?
yes_____ no_____

10. Brief of Authorities

a) Has a brief of authorities been delivered?
yes____ no____

b) If "no", will one be delivered before trial?
yes____ no____

11. Settlement Conference

a) Already held on_____(date) by_____

b) Further settlement conference will be conducted: yes___no___

c) If yes, by Judge:_____ on_____(date)

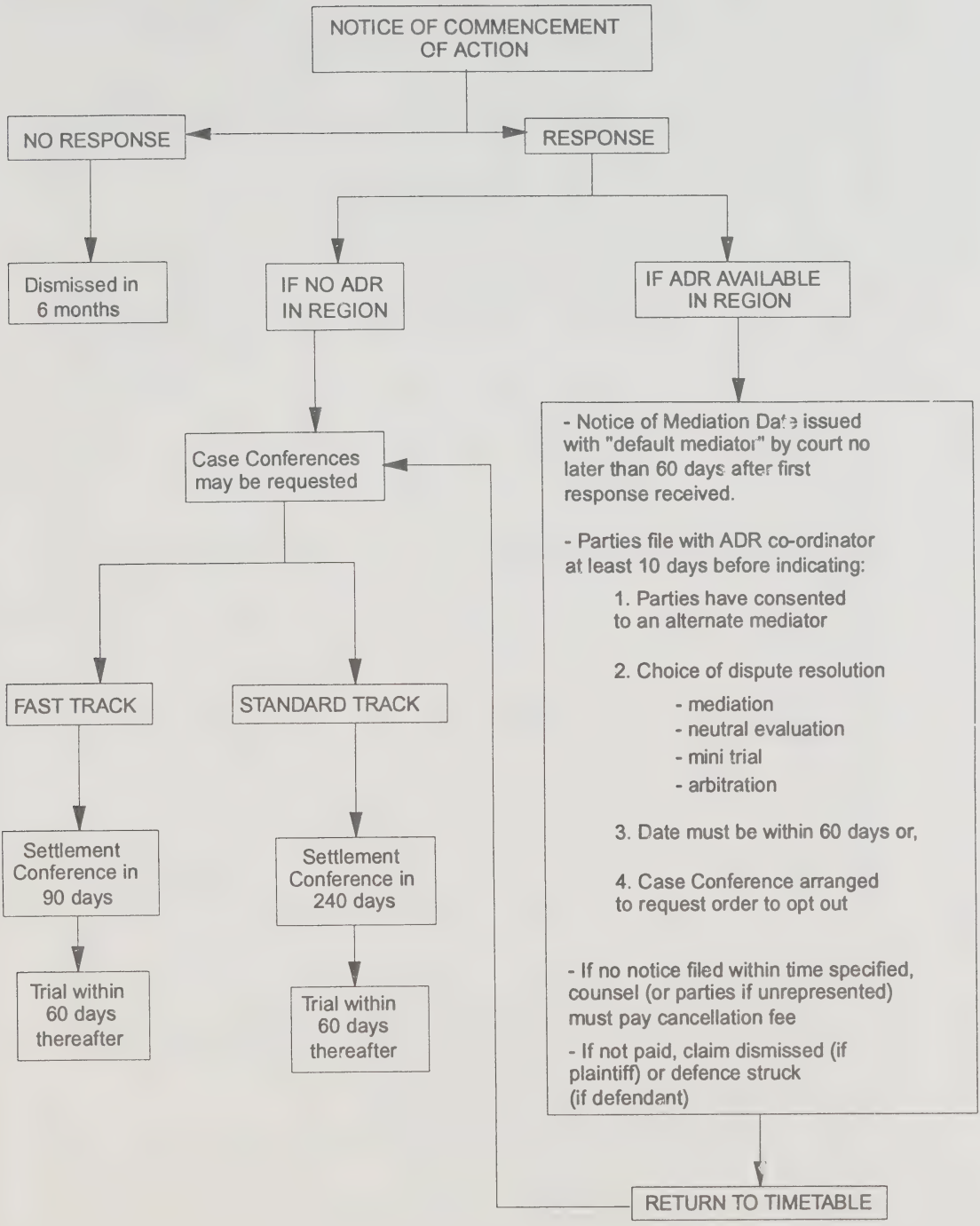
12. Readiness for Trial

a) Estimated trial time required:_____

b) Likelihood of settlement prior to trial (indicate % of likelihood):_____

c) Are there any special circumstances which should be noted to assist in scheduling this matter for trial? (i.e. witnesses from out of town; large courtroom required due to number of counsel or documents?)

_____
_____
_____
_____
_____
_____
_____


NOTICE OF COMMENCEMENT OF ACTION
NO RESPONSE
RESPONSE
Dismissed in 6 months
IF NO ADR IN REGION
IF ADR AVAILABLE IN REGION
Case Conferences may be requested
- Notice of Mediation Date issued with "default mediator" by court no later than 60 days after first response received.
- Parties file with ADR co-ordinator at least 10 days before indicating:
1. Parties have consented to an alternate mediator
2. Choice of dispute resolution
- mediation
- neutral evaluation
- mini trial
- arbitration
3. Date must be within 60 days or,
4. Case Conference arranged to request order to opt out
- If no notice filed within time specified, counsel (or parties if unrepresented) must pay cancellation fee
- If not paid, claim dismissed (if plaintiff) or defence struck (if defendant)
FAST TRACK
STANDARD TRACK
Settlement Conference in 90 days
Settlement Conference in 240 days
Trial within 60 days thereafter
Trial within 60 days thereafter
RETURN TO TIMETABLE

APPENDIX 3: CONTINGENCY FEES IN CANADIAN JURISDICTIONS

	B.C.	ALTA.	SASK.	MAN.	QUE.	N.B.	P.E.I.	N.S.	NFLD.	YUKON	N.W.T.	LSUC	CBA-O
Permitted	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Recommended	Recommended
Legal Authority	Legal Profession Act S.B.C. 1987, Chap. 25, s. 78	Alberta Rules of Court r. 613-621	Speers v. Hagemeister (1974), 52 D.L.R. (3d) 109 (Sask. C.A.).	Law Society Act, R.S.M. 1987, c. L 100, s. 58	Code of Ethics for Advocats R.R.Q. 1981, c. B-1, r. 1-8, 3.08.01-3.08.08	Judicature Act, R.S.N.B. 1973 Ch. J-2	P.E.I., Rules of Court, r. 57	Nova Scotia Civil Procedure Rules, r.63.16-63.21	Rules of Supreme Court, r. 55.15 -55.20	Legal Profession Act, R.S.Y. 1986, chap. 100, s. 68	N.W.T. Rules of Court, R-101-96, r. 657-663	Bill 3, An Act to Amend the Solicitors Act, 1st Sess., 36th Leg., Ontario, 1995 to amend Solicitors Act R.S.O. 1990, C.S. 15, s. 28	amend Solicitors Act R.S.O. 1990, c.S. 15, s. 28
Since when	1979	1969	1975	1890	1968	1973	1977	1972	Formally 1986	1980	Formally 1979	N/A	N/A
Pre-Authorized Forms	Must be in writing; Benchers may make rules re: form of agreement and limits to charges	Must be in writing & signed by client or agent	No	Must be in writing & signed by client or agent	No	Must be in writing & signed by client or agent	Must be in writing & signed by client or agent	Must be in writing & signed by client or agent	Must be in writing & signed by client or agent	Must be in writing & signed by client or agent	Must be in writing & signed by client or agent	Must be in writing & signed by parties but no specific form; if in writing it's enforceable; if not lawyer can't render account if client lost & if client wins only on a quantum meruit basis	Must be in writing & signed by parties; should be standard form; client must receive copy

	B.C.	ALTA.	SASK.	MAN.	QUE.	N.B.	P.E.I.	N.S.	NFLD.	YUKON	N.W.T.	LSUC	CBA-O
Statutory Lists of Mandatory Contents	No	Name & address of client(s) & lawyer; nature of claim; statement of the contingenc y & the maximum amount of rate contingency not to exceed; notice of right of review	No	Not in the Act; lawyer must deliver a copy to client with notice of right of review	No	Name & address of client(s) & lawyer; nature of claim; statement of the contingency and the basis of recovery	Name & address of client(s) & lawyer; nature of claim; statement of contingency, the maximum amount or rate compensation not to exceed; notice of right of review	Name & address of client(s) & lawyer; nature of claim; statement of contingency, the maximum amount or rate compensation not to exceed; notice of right of review	Name & address of client(s) & lawyer; nature of claim; statement of contingency, the maximum amount or rate compensation not to exceed; notice of right of review	Set out percentage applied; notice of right of review	Name & address of client(s) & lawyer; nature of claim; statement of the contingenc y and the maximum amount or rate compensation not to exceed; notice of right to review	N/A	There should be mandatory terms; percentage ; notice of right to review, client is responsible for costs & disbursements
Filing with Courts	No	Yes, within 15 days of signing but it's confidential to public	No	No	No	Yes, but it's confidential to public; court examines it upon filing for fairness & reasonableness	Yes, within 10 days of signing but it's not a public document	Yes, within 10 days of signing but it's not a public document	Yes, within 10 days of signing but it's confidential to public	No	Yes, within 15 days of signing but it's not a public document	No, but client should have right to have court review agreement when signed	No

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Sanctions	If the remuneration is in excess of the amount permitted or is in excess of the amount fixed, the excess shall be refunded to the client on demand	If contents not proper or no filing, lawyer only entitled to compensation in absence of agreement and without regard to the contingency	No	If don't deliver notice of right of review, lawyer only entitled to compensation in absence of agreement	No	Upon review at filing, Registrar may vary, modify or disallow any provision, until Registrar decides that agreement complies with statute, it is null and void	If contents not proper or no filing, lawyer only entitled to compensation in absence of agreement and without regard to the contingency	If contents not proper or no filing, lawyer only entitled to compensation in absence of agreement and without regard to the contingency	If contents not proper or no filing, lawyer only entitled to compensation in absence of agreement and without regard to the contingency	If the remuneration is in excess of the amount permitted or is in excess of the amount fixed, the excess shall be refunded to the client on demand	If not filed, lawyer only entitled to compensation in absence of agreement and without regard to contingency	No	If a client does not receive a copy it's unenforceable
Prohibited Areas & Clients	Child custody or access; Matrimonial disputes (unless court approved)	No	No	No	No	Improper for Defendant in Criminal or quasi-Criminal matters; lawyer not allowed to make agreement with client who is able to pay	No	No	No	Family Law, Legally Disabled, Distribution of Estates	No	Family and Criminal	Family and Criminal
Court Review Available & Limitation Period	Yes, within 90 days after agreement made or retainer terminated	Yes, at any time after agreement made until expiry of 6 months from last date on which lawyer has received the fee or part of the fee	Yes	Yes, at any time within 3 months after payment to lawyer	No	Yes, after the successful completion of the matter	Yes, at any time after agreement is made until expiry of 8 months from date on which lawyer received the fee or part of the fee	Yes, at any time after agreement is made until expiry of 6 months from date on which lawyer received the fee or part of the fee	Yes, at any time after agreement is made until expiry of 6 months from date on which lawyer received the fee or part of the fee	Yes, within 90 days after agreement made or retainer terminated	Yes, at any time after agreement made until expiry of 1 year from last date lawyer has received the fee or part of the fee	Yes, to a Judge not Assessment Officer or Master	Yes, to an Assessment Officer by either party

	B.C.	ALTA.	SASK.	MAN.	QUE.	N.B.	P.E.I.	N.S.	NFLD.	YUKON	N.W.T.	LSUC	CBA-O
Fixed or Maximum Fee Specified & Basis of Compensation	Lawyer cannot be paid a fee based on the amount recovered and an amount equal to any costs awarded to client	No	Suggested 20% before trial, 25% after trial. Discourage practice of fees plus costs.	No provision but generally 45% up to $10,000 and 10% over $100,000	No	No	No	No	No	No	No	20% with leave of court to permit higher; lawyer entitled to costs plus the fee applied to the actual recovery with respect to the claim	Sliding fee scale with lower maximum for settlements prior to discovery and increasing as move along in process; percentage should be applied to gross recovery excluding costs; client should be liable for costs & disbursements even if unsuccessful
Settlement Provision	None	Provision requiring lawyer consent is void	None	None	None	Provision requiring lawyer consent is void	Provision requiring lawyer consent is void	Provision requiring lawyer consent is void	Provision requiring lawyer consent is void	No	Provision requiring lawyer consent is void	N/A	N/A

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Termination/ Change Lawyer Provision	None	Client may change lawyers notwithstanding agreement	None	None	None	Provision that client cannot change lawyers is void but lawyer entitled to fees & disbursements s/he would otherwise be entitled to	Client may change lawyers notwithstanding agreement	Client may change lawyers notwithstanding agreement	Client may change lawyers notwithstanding agreement	No	Client may change lawyers notwithstanding agreement	N/A	Client may change lawyers subject to paying lawyer for work done on traditional basis

Note: This chart is up-to-date as of 1994. Quebec no longer has any specific regulations regarding contingency fees, their only requirement is that the fees be fair and reasonable.

APPENDIX 4:

CIVIL JUSTICE REVIEW WORKING GROUPS

CASE MANAGEMENT WORKING GROUP

Chairs

The Honourable Madam Justice G. I. Pardu (Co-Chair -- Judiciary Representative)
Mary Lou Benotto (now Madam Justice Benotto) (Co-Chair -- Bar Representative)

Judiciary Representatives

The Honourable Mr. Justice J. Ground
The Honourable Mr. Justice L. Morin
John McMahon, Executive Legal Officer
Grant Goldrich, Business Analyst

Ministry Representatives

Hugette Malyon
Lori Jokelainen

Bar Representative

Mary M. Fox

Public Representative

Rose Dotten

Civil Justice Review Representatives

Bob Beaudoin
Ann Merritt
Faye Grutzmacher

Guests

Christine Hart
Master B.T. Clark

FAMILY LAW WORKING GROUP

Chair

The Honourable Regional Senior Justice Thomas Granger (Judiciary Representative)

Judiciary Representatives

The Honourable Mr. Justice George T. Walsh
The Honourable Mr. Justice G. Czutrin
The Honourable Judge Maria T. Linhares-de Sousa
The Honourable Judge Wilma Scott

Ministry Representatives

Debra Paulseth
Willson McTavish
Lorraine Martin
Anita McConnell

Bar Representatives

Carole Curtis
Russell Smart
E. Pauline Taylor
James G. McLeod
Gerry P. Sadvari

Public Representatives

Beverley Maister
Robert McIntyre

CIVIL JUSTICE TECHNOLOGY ADVISORY COMMITTEE

Chairs

The Honourable Madam Justice B. Wein (Co-Chair -- Judiciary Representative)
Angela Longo (Co-Chair -- Ministry Representative)

Judiciary Representatives

The Honourable Mr. Justice Robert A. Blair
The Honourable Mr. Justice George Valin
The Honourable Mr. Justice Marvin Catzman
The Honourable Judge Wilma Scott

Ministry Representatives

Heather Cooper
Michael Jordan
Debra Paulseth

Bar Representatives

David Wires
Benjamin Zarnett
Peter Cronyn
Susan McGrath

Public Representatives

Brian Chan
Steve Duncan
Charles Bennett
Darlene Kindiak

Civil Justice Review

Ann Merritt
Maurice Clément (Project Manager)

BACKLOG WORKING GROUP

Judiciary Representative

The Honourable Regional Senior Justice Chadwick

Ministry Representative

Joe Mideo

Bar Representative

Roger Oatley